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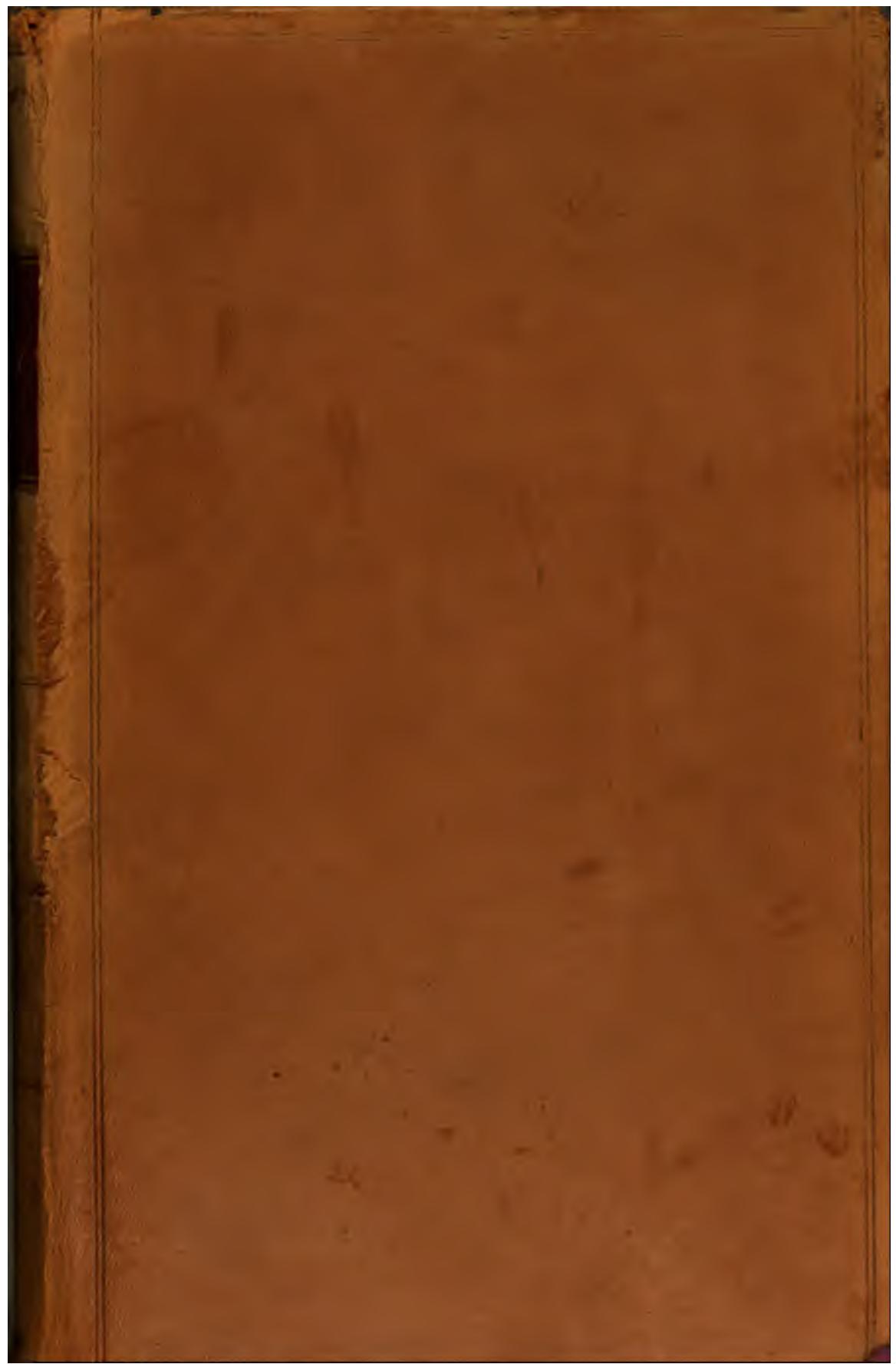
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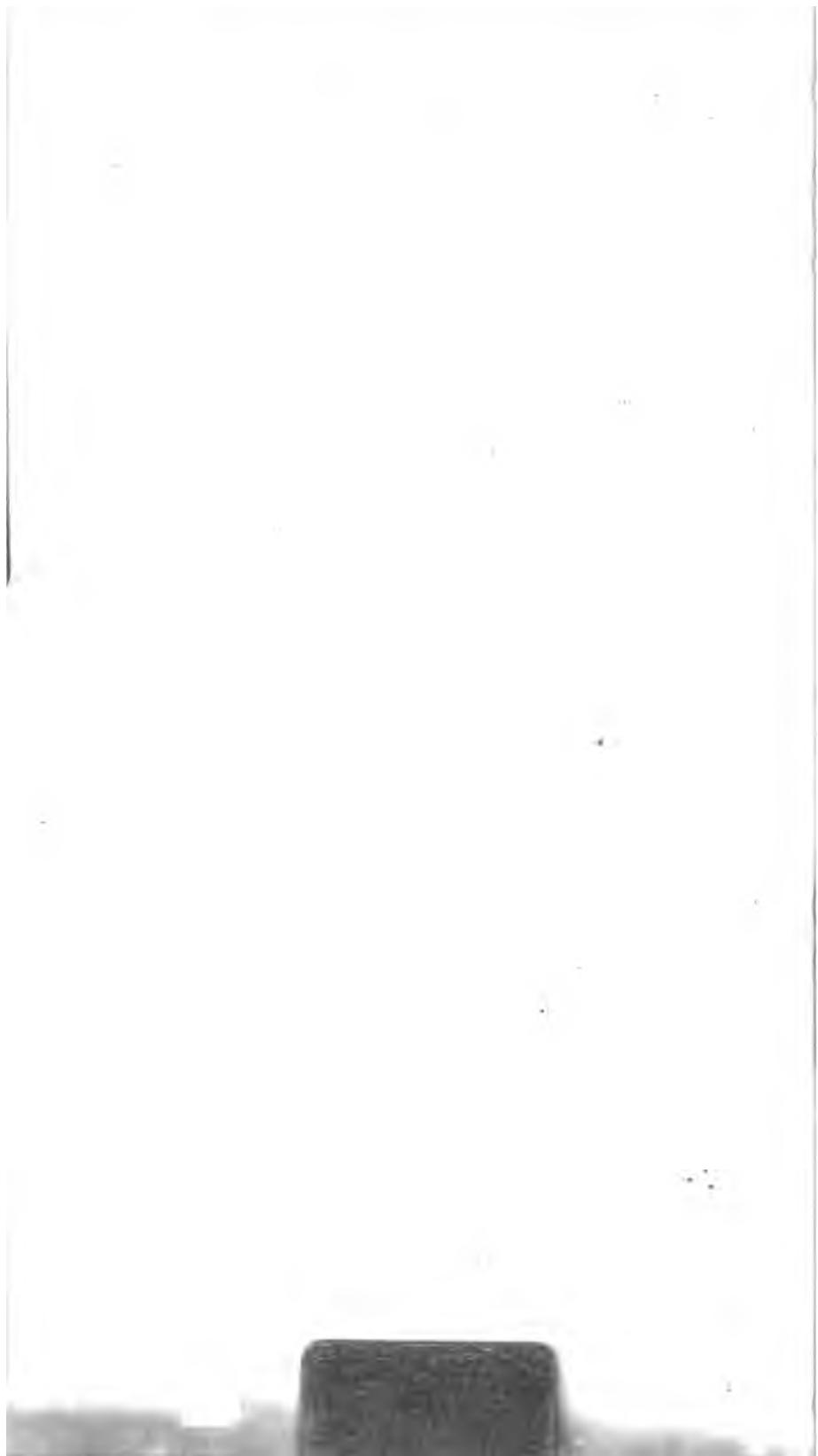
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[Redacted]





REPORTS
OF
CASES ADJUDGED
IN THE
District Court of South Carolina.

BY THE HON. THOMAS BEE,
Judge of that Court.

TO WHICH IS ADDED
AN APPENDIX,
CONTAINING
Decisions in the Admiralty Court of Pennsylvania.
BY THE LATE FRANCIS HOPKINSON, ESQUIRE.

AND
CASES DETERMINED
IN OTHER DISTRICTS OF THE UNITED STATES.

PHILADELPHIA:
PUBLISHED BY WILLIAM P. FARRAND AND CO.
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1810.

DISTRICT OF PENNSYLVANIA, TO WIT:

L. S. * BE IT REMEMBERED, That on the seventeenth day of
March, in the thirty-fourth year of the Independence of the
United States of America, A. D. 1810, William P. Farrand and
Co. of the said district, have deposited in this office the title of a book the right
whereof they claim as proprietors, in the words following, to wit:

"Reports of Cases adjudged in the District Court of South Carolina. By the
Hon. Thomas Bee, Judge of that Court. To which is added an Appendix,
containing Decisions in the Admiralty court of Pennsylvania. By
the late Francis Hopkinson, Esq. And Cases determined in other
Districts of the United States."

In conformity to the act of the Congress of the United States, intituled, "An
act for the encouragement of learning, by securing the copies of maps, charts,
and books, to the authors and proprietors of such copies during the times there-
in mentioned." And also to the act, entitled, "An act supplementary to an act,
entitled, 'An act for the encouragement of learning, by securing the copies of
maps, charts, and books, to the authors and proprietors of such copies during
the time therein mentioned,' and extending the benefits thereof to the arts of
designing, engraving, and etching historical and other prints."

D. CALDWELL,
Clerk of the district of Pennsylvania.

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PREFACE.

THESE decisions are published at the suggestion of many members of the *Charleston* bar, and in the hope that they may afford some aid to the profession in general, and some direction to merchants, captains of ships, and mariners, whose interests constitute the chief subject of them.

It is presumed they have been, in most instances, satisfactory, for in every case of appeal, except one, they have been confirmed.

It was the intention and wish of the Judge to revise them before publication; but he was prevented from doing so by a very long and serious illness. The candour of the profession will make due allowance for this very material circumstance.

Judge *Davis's* decree in the district court of *Massachusetts* is here republished, not only on account of its intrinsic excellence, but because it gives weight to a similar decision by judge *Bee:* the circuit court of *Pennsylvania* having given a different determination, it is desirable that the question should be finally settled by the Supreme Judicature of the *United States.*

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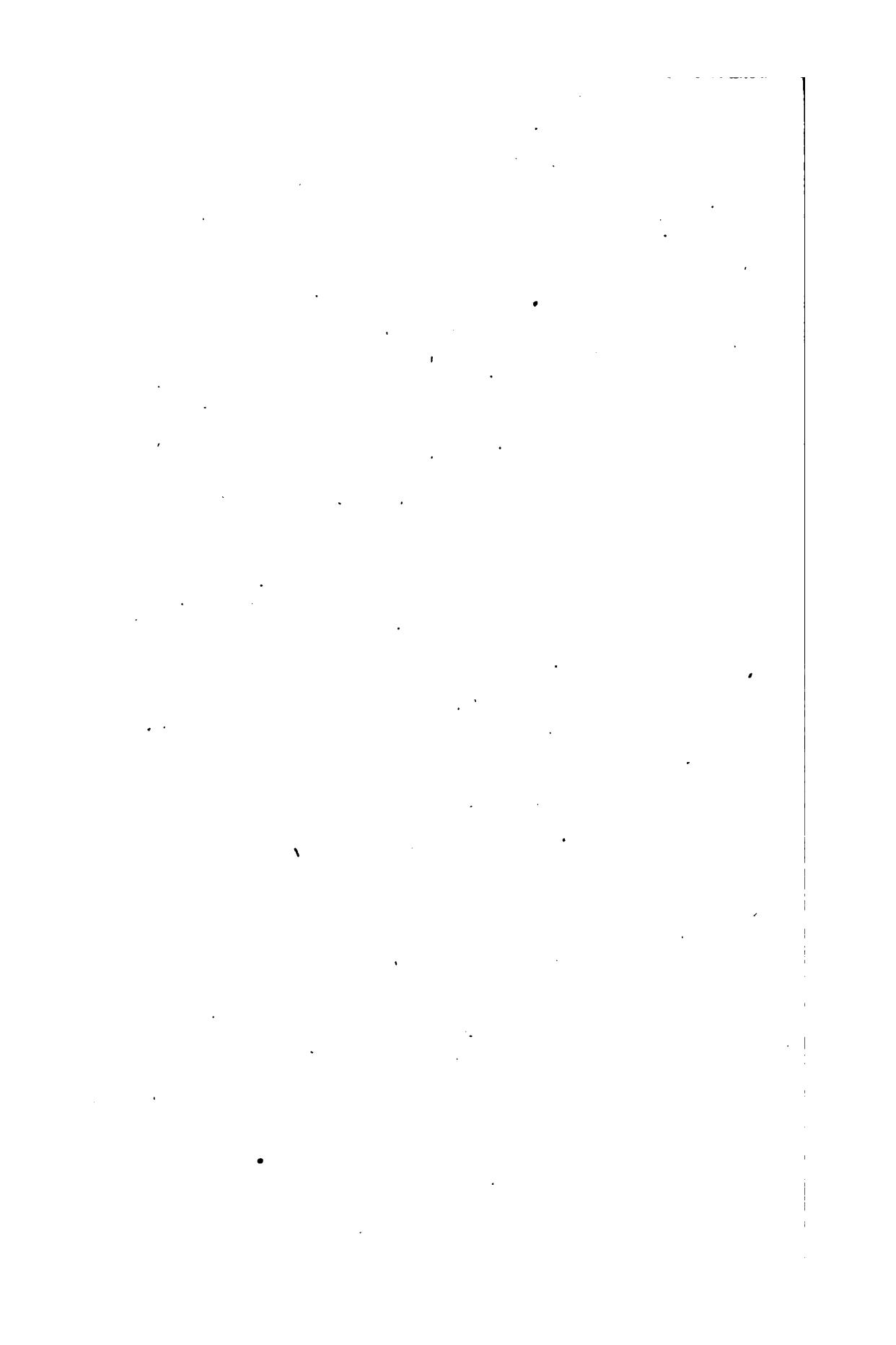
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CASES

IN THE

District Court of South Carolina.

William Hindry v. Schooner Priscilla.

1792.

THIS is the first case, since my appointment as ^{1792.} judge of the court of admiralty, of a vessel libel-
led as wreck found on the high and open seas; and, One half de-
creed by way
of salvage, in
case of a ves-
sel found de-
relict on the
high seas. as far as the records of the court have been traced, the first that appears to have come before the court at any time.

I have carefully considered the schooner *Priscilla's* situation, and the law relative thereto, and do pronounce the said vessel to be a wreck found drifting at sea, without any living animal on board, as specified in the libel, and proved in court by two witnesses. I condemn her accordingly; with her tackle, furniture, and apparel, as appurtenances found on board. I also order and direct that the marshal of this district do, on the 20th day of this month, after fifteen days' notice in one of the gazettes of *Charleston*, expose to sale, and sell at public outcry for the most money that can be obtained, the said schooner, with her appurtenances as aforesaid. And that, after paying out of the proceeds of such sale all the fees, costs, and charges of this suit, and the expenses of the sale, he pay to the libellants,

A the

Cases adjudged in the

1792. the master, mariners, and owners of the brigantine
Wm. Hindry *Mentor*, one half of the net proceeds of such sale, as
Seth. *Priscilla*. salvage, for securing and bringing into port the said
schooner.

I order that the marshal deposit the other half-part of
said net proceeds in the Branch Bank of the *United
States* in this city; subject to the future order of this
court, and for the use of the former owner or owners
of the *Priscilla*, or other person or persons by him or
them duly authorized, and applying for the same.

I further order that due notice thereof be given by
the marshal, in one of the gazettes printed in *Charles-
ton*, once in every month for twelve months ensuing.
And that the marshal do, as soon as the sales are closed,
render a due and just account of all payments and
disbursements made for and on account of the said
schooner.

1793.

August 29.

Skrine v. Sloop Hope.

THE libellant, as part owner of this sloop, prays the
court to decree a sale thereof, in order to have a
division of the property. The libel charges that on the
7th July 1791, the libellant purchased one half of this
vessel from one Snetskar, who was then owner of the
whole; that said Snetskar, on the 24th of December,
previously to the 1792, made a fictitious sale of the sloop to Pitcher,
condamnation and sale who afterwards relinquished his purchase; that Snetskar
of their property induced two of the seamen belonging to the vessel to

Master of a
ship may hy-
pothe-
cate
under cer-
tain circum-
stances; but
cannot sell
the ship. make a claim of wages, and to procure a sale of the
sloop in Georgia, to William Tyler for 50L which
sum was paid to Jackson, who was, or pretended to be,
a constable acting under legal authority. Libellant prays
a sale as above, and also that he may be paid out of
the proceeds what may appear due to him on account
of

District Court of South Carolina.

6

of the vessel. The answer of *Tyler*, who now claims the sloop, states that he bought her at public auction of the sheriff of *Camden* county in *Georgia*. That he paid a valuable consideration, and did not then know of any claim of said *Skrine*.

Shetzer's answer was in court, but the proctor for the actor objected to it; and it was agreed that he should be examined *viva voce*. He was reluctant in answering particular questions, and prevaricated much. In some points he was directly contradicted by *Magwood*, the agent employed by *Skrine* and himself to draw a proper bill of sale. This witness saw *Skrine* pay the money, and receive formal possession.

The sale in *Georgia* is also proved; by which it appears that *Tyler* also was a fair purchaser for valuable consideration. There was no evidence to shew that *Skrine* had forbidden the sale openly; though he had given notice of his claim to the constable who advertised the sloop for sale.

No proof was adduced of the proceedings of the court in *Georgia*, under which the vessel was said to be sold. The defendant's proctor rested his defence entirely on a defect of title in *Skrine*, arising from the 11th section of the act of Congress of 1st September 1789, for registering and clearing vessels, &c.

The intention of this was to relieve American owners of vessels from the duties on tonnage; but this advantage could not be claimed, unless they complied with certain regulations. Of these the regulation contained in the 11th clause is one. It declares what transfers or sales shall be void, and that vessels so transferred or sold shall not be entitled to the advantages secured to vessels of the *United States*.

But it is unnecessary to observe further upon this law, as it was repealed (with a few exceptions not relative to this case) by act of Congress of 31st December 1792, and 17th March 1793.

The

1793. The 14th clause of the act of *December 1792*,
which was substituted for the 11th clause of the act of
^{Skrine} _{Sloop Hope.} 1789, shews what the framers of that law meant, and
completely destroys the ground of defence principally
relied on.

Proof of condemnation in a court of competent jurisdiction in *Georgia* might have vested a legal title in *Tyler*, who purchased for a valuable consideration, and have set aside the right of the libellant to his moiety. But no such proof has been produced. Great circumspection must be observed in all that relates to the condemnation and sale of vessels; for, otherwise, owners would hold their property by a very precarious tenure. Hence the master of a ship, though possessed of extensive powers, cannot sell the ship. His contracts with seamen must, if necessary, be fulfilled by hypothecation of the vessel to raise money, if other means fail; and supplies in a foreign port will justify a similar step; but they cannot wholly divest the owner of his property.

In this case, I am satisfied of *Skrine's* right, and therefore decree the sale-prayed for in his libel; so far as to effect a division. As to profits, they do not appear to have been great, and there have been expenses which may be set against them. *Tyler*, the present proprietor, appears to the court in a fair point of view. And, indeed, I have doubts of my power in a court of admiralty, to assess damages, or investigate these accounts. Let the sloop *Hope* be sold by the marshal of this court after due notice of fifteen days in one of the gazettes. After payment of the expenses of this suit, let one half of the net proceeds be paid to the libellant, and the other half to *Tyler*, one of the defendants.

Arnold

Arnold v. Delcol.

1794.

A SHORT statement of this case may be seen in 3d *Dallas's Reports*, 383.

A plea to the jurisdiction of the district court had been over-ruled, and after argument upon the merits, a decree was pronounced in favour of *Arnold* for the sum of 33,000 dollars and upwards.

Upon appeal from this decision to the circuit court, judge *Bee* assigned the following grounds of his opinion in the district court.

1st. Because it appeared in evidence that the *Grand Sachem* had a regular register and sea-letter, to shew that she was an American vessel, and to entitle her to all the privileges of one.

2d. That the property in *Arnold*, an American citizen, was fully proved.

3d. That by the 25th article of the treaty with *France*, the production of sea-letters was sufficient in itself to prevent any just detention of the vessel.

4th. That the witnesses, who maintained that the trade to *New-Orleans* could only be carried on in Spanish bottoms, speak of a time prior to the period when *Arnold's* vessel was there, and prior also to the edict of 1793, by which that trade was opened.

5th. That there was much contrariety of evidence as to the legality of trade with *New-Orleans*, which, though prohibited generally in other than Spanish ships, was sometimes carried on, *by express permission*, in foreign bottoms. It was proved by one of the witnesses, that two American vessels laden with provisions had arrived at *New-Orleans* under such permission, notwithstanding which they could not proceed up the river till they had procured *Spanish colours*. That a compliance with this indispensable requisite was not sufficient

An Ameri-
can vessel
does not for-
feit her neu-
tral char-
acter merely
by hoisting a
foreign flag
in confor-
mity to the
regulations
of a particu-
lar trade.

Spanish
clearances
found on
board an
American
ship are not
proofs of dou-
ble papers, if
no other
marks of
fraud ap-
pear.

*Cases adjudged in the*1794.Arnoldv.Delcol.

sufficient to divest the *Grand Sachem* of her American character and privileges.

6th. That there was no pretence of double papers, or of any fraud or collusion supported by legal proof. That the only Spanish papers were a receipt in that language by the captain, produced to shew that the property on board belonged to Cox and Clark; (but the captain swears he signed it from ignorance of the Spanish language alone, as he knew that the whole belonged to *Arnold*,) and some Spanish clearances, without which the brig could not have departed from a Spanish port.

Clark, too, swears positively that the property was in *Arnold*, and that he himself was only an agent.

The decree of the district court, founded upon these and other reasons, was confirmed in the circuit court, and that decision was finally supported in the supreme court. See *Dallas's Reports* as above cited.

Thomas Tunno v. Benedict Preary.

A sea-letter
not the only
document
necessary to
establish the
neutral cha-
racter of a
vessel be-
longing to
the United
States under
treaty with
France.

LIBEL states that on the 18th September last, the snow *Nancy*, *Clark*, master, an American vessel owned in this place, was boarded on the high seas by an officer and some of the crew of the *Joujon* French privateer; and that twelve thousand dollars were carried away from said snow by one *Brown*, the officer who boarded. That the said dollars were shipped by *Thomas Plunkett*, an American citizen, resident at the *Havanna*, and consigned to the actor in this cause. That they were put in charge of *Don Lewis Cuesta*, a passenger on board, who had also a bill of lading and letter of advice respecting this money, which, together with the money, were carried off as above stated.

The claim and answer state that this was not a lawful American vessel, and not furnished with the usual and

and necessary papers. It is denied that the dollars in question belonged to *Plunkett*, or that said *Plunkett* was an American citizen; and it is alleged that the vessel was collusively engaged in the Spanish trade, and this money liable to seizure as Spanish property.

It is clear from the evidence that this is an American vessel, owned by citizens of the *United States*, and duly registered in this port. It appeared also that she had no sea-letter, there being none at the custom-house when she sailed.

The only ground relied on in arguing this cause, was the necessity of a sea-letter, according to the 25th article of our treaty with *France*. It was strongly contended that the said article makes the sea-letter or passport the only criterion of a free vessel. But this does not appear to me to be the case. If, indeed, an American vessel should be without this passport, and other suspicious circumstances should appear, the French ship of war would be justified in making further search, and, if it should seem proper, in carrying the vessel *infra prædicta* of the French courts, for inquiry and adjudication. This has frequently been done; nor will such conduct incur damages if the neutral vessel should be ultimately discharged.

In two late cases, the *Grand Sablon* and the *Polly*, the passports so much clamored for, were on board, and were regularly produced; but they availed nothing, for both those vessels were seized and plundered. I cannot say what might have been the case here; but I am clearly of opinion that no article of the treaty could justify the carrying away of this money, without legal adjudication.

Some arguments in favour of the claimant were drawn from the law of nations; but they cannot apply where, as in this case, a treaty subsists to guide us.

It was said that a proclamation of the president required that all American vessels should be provided with

1794.
Treaty
▼
Treasy.

1794.

Tunno

v.
Perry.

with a sea-letter. Upon inquiry I find that, by instructions from the treasury department, the different collectors were enjoined to furnish sea-letters for the better identification and security of our ships, and as being valuable in several points of view. This is unquestionable, but cannot make law.

Brown, the boarding officer, was an old American ship-master; he examined the papers of this vessel, and must have been satisfied of her neutral character, without which he would have made prize of her and of her cargo, which was Spanish. He would also have seized other sums of money, produced by the captain of the snow as belonging to himself. He might have taken all with equal propriety; but he knew that the vessel was free, and made all on board so. Even contraband was not liable to seizure, unless there had been proof of its being bound to the port of an enemy. The 23d article of the treaty should have taught Mr. *Brown* its true construction and spirit; he must abide the consequences of disregarding it. It is unfortunate for this claimant to have been connected with persons capable of acting as these privateersmen did. Owners should be careful whom they trust; otherwise, without fault, they will be exposed to frequent misfortune. I am pleased to learn that two thirds of the plundered money have been already recovered from the grasp of those who took it, and I shall at all times afford the aid of this court to pursue the remainder into whatever hands it may have fallen.

At present, I adjudge and decree that the claim in this case be dismissed with costs, and that the sum of 12,000 dollars be paid by the claimant to the actor.

Teasdale,

Teasdale v. Sloop Rambler and Cargo, and Edward Ballard.

1794.

DECREE.—The matter to be determined is, whether a plea to the jurisdiction of this court can, consistently with its rules of practice, be filed by a third person, who calls himself an agent of the French republic.

All the cases quoted, and some others that I have looked into, maintain that such a plea cannot be exhibited by an attorney, proctor, or solicitor; and the reason is assigned, viz. that as the party must ratify the act of the agent, he thereby admits the jurisdiction of the court in the first instance, and must exhibit his plea to the jurisdiction in *propria personâ*, and on oath.

In the present case, a libel has been filed against *Edward Ballard*, and a sloop and cargo, taken by him on the high seas, belonging to subjects of *Great Britain*, in amity with us. The libel charges that *Ballard* is a citizen of the *United States*; that his vessel was fitted out and is owned there, and that his crew are citizens of the *United States*: that the capture is therefore illegal, being contrary to the laws of neutrality and of nations.

Ballard does not appear, and answer on oath to the charges in the libel, which, by the rules of the civil law, he is required to do; these charges, therefore, must be considered as true. But a third person, *Saspertas*, comes forward in behalf of the French republic, and of captain *Ballard*, and pleads to the jurisdiction, insisting that neither he nor *Ballard* is bound to appear, or answer the libel; first, because the vessel commanded by *Ballard* belongs to the French republic, and was fitted, armed, and commissioned by their authority. Secondly, that *Ballard* is a French citizen; but that, even if he were a citizen of the *United States*,

1794. he had a right to command this vessel for the benefit
Tennale of *France*, and to capture prizes from her enemies.

^{v.}
Sloop Ram-
bler. Cases were produced to shew that any person may, in a court of civil law, interpose pleas and claims for others who are absent. This is true to a certain extent; and there would be a failure of justice if it were otherwise. But there is not a single instance of a plea to the jurisdiction interposed in this manner. The reason has been already assigned; the jurisdiction is admitted as soon as the act of the agent is ratified by the principal. At common law, this same consequence follows from filing the power of attorney.

The actor in civil law courts, and the complainant in chancery is entitled to call for the *oath* of defendants, because it is otherwise difficult to get at a knowledge of the facts. To controvert this oath, there must be the evidence of two witnesses.

It is admitted that if the suit be *in personam*, the defendant alone can either plead, answer, or claim. But it is said that if the suit be *in rem*, all persons may interpose a plea or claim, though they are not expressly named in the libel. Nobody, however, can *answer*, unless named in the libel. *Sasportas*, to justify his interposition in this case, exhibits a certificate from the French consul, authorizing him to comply with certain customhouse requisites as to *Ballard's* prizes, of which the *Rambler* is one. He is further authorized by this paper to hold the proceeds at the disposal of the French republic, whose agent he is said therein to be. The certificate is dated eleven days after this suit was instituted, and when the property was in the hands of the marshal of this court. Letters of agency, or powers of attorney, are to be pursued strictly; and the one in question, authorizing only customhouse entries, can never be a warrant for defending this suit.

In the case of *Jansen* and *Talbot*, *Ballard* suffered his third default to be recorded, and relinquished thereby,

thereby, all claim. *Talbot*, indeed, stated that he found the prize in *Ballard's* possession, and took it from him because he had no commission. Here, *Ballard* does not relinquish, but procures a third person to interpose a plea in his behalf, though he is, himself, on the spot, and has been duly served with process of the court.

1794.

Treasore

v.

Sloop Ram-

bier.

Let *Sasportas'* plea be repelled with costs, as being brought forward by a person incompetent thereto.

Joost Jansen v. The Brigantine Vrow Christina Magdalena, and Edward Ballard.

THE libel in this case states that the said brigantine *Vrow Christina Magdalena*, and *Edward Ballard*, is the property of *Western and Ehrman* of *Amsterdam*; and that the cargo on board is owned by other citizens of the *United Netherlands*, between whom and the *United States of America* there is peace and amity, and also a treaty of amity and commerce now in full force, dated 8th *October*, 1782.

That the said vessel sailed from the island of *Curraçoa*, on the first day of *April* last, bound to *Amsterdam* with a valuable cargo, belonging, as appears by the manifest, to divers citizens of the *United Netherlands*, in company with other merchant ships, under convoy of the *Dolphin* frigate, and an armed schooner called the *Flora*. That the fleet touched at *Jamaica*, and sailed from thence on the 27th of *April*. That the brigantine having parted with the convoy, through accident, near the island of *Cuba*, was, on the 16th of *May*, fired at, and captured as prize by the armed schooner, *L'Ami de la Liberté*, captain *Edward Ballard*, who took out part of the crew, put on board a prizemaster

what equipments in our ports

amounts to breach of neutrality.

Under what circumstances an American citizen may acquire

a new national character.

1794. Joost Jansen prizemaster and a new crew, and ordered the prize to Charleston, in the state of South Carolina.

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That the captain and most of the men on board the armed schooner were Americans, citizens of the United States of America. That the next day, they met with another armed schooner called *L'Ami de la Point-à-Petre*, commanded by captain *William Talbot*, who took the mate and four hands out of the brig, and proceeded, in company with her and the other schooner, to Charleston, where she arrived on the 25th day of *May* last. That the said *Edward Ballard* is and was, on the 16th *May* last, a citizen and inhabitant of the United States, and a native and resident of the state of Virginia, between whom and the states general of the United Netherlands there exist, and then existed, peace and amity.

That the schooner called *L'Ami de la Liberté* is American built, and owned by citizens of America, and was equipped for war in the bay of Chesapeake, in Virginia, and at Charleston in South Carolina, by the said *Edward Ballard* and other citizens of the United States, contrary to, and in violation of the proclamations of neutrality published by the president of the United States, and the governors of Virginia and South Carolina, and also contrary to the laws of neutrality and of nations.

That the said schooner is owned by *John Sinclair* and *Solomon Wilson*, citizens and inhabitants of Virginia and Maryland, and by the said *Edward Ballard*, or by some or one of them; and was fitted as aforesaid in violation of the treaties and laws of the United States, of the proclamations of neutrality aforesaid, founded on such laws, and also contrary to the laws of nations.

That the said *Edward Ballard* hath not, nor can, by the laws of the United States, and by treaties which the constitution of the said states declares to be the supreme

supreme law of the land, legally have any commission, 1794.
power, or authority whatsoever, to seize, arrest, or take Joost Jansen
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tine Vrow
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a vessel belonging to the *United Netherlands*. That
the seizure and capture aforesaid was contrary to, and
in direct violation of the article of a treaty of amity
now in force between the *United States* and the *United
Netherlands*, by force of which, such capture can vest
no property in the captors, nor divest the original
owners of their property in said vessel and cargo: for
which reason they demand restitution of the same, and
damages for the arrest, spoliation and detention there-
of. Two exhibits and a manifest of the cargo were
filed, with the libel, on the 20th day of *June* last,
and a monition was issued in the usual form, calling
upon the said *Edward Ballard* and all others having
or claiming any right or title to bring forward the
same on pain of having the libel taken *pro confesso*.

Captain *Ballard* declining to appear to the usual pro-
clamations, or the monition on the return of the same,
his third and last default was pronounced and recorded
in the usual form.

At this period a claim was interposed by captain
William Talbot, on behalf of himself, and the *owners*,
officers and seamen of a private vessel of war, called
L'ami de la Point-à-Petre, duly commissioned, arm-
ed, equipped, and appointed under the French repub-
lic, which said owners, officers and seamen, are stated
to be, all of them, citizens of the said republic. The
claim sets forth that, on the 28th day of *December*
1793, captain *Talbot* was regularly admitted a citizen
of the republic of *France*, by the municipality of *Point-
à-Petre*, in the island of *Guadeloupe*, under a decree
of the national assembly of the French republic, and
hath continued and acted as such, and against the ene-
mies thereof, ever since. That he is captain and com-
mander of the said schooner *L'Ami de la Point-à-Pe-
tre*, by virtue of a commission under the authority of
the

1794. *ginia*, (though lately collusively removed to *Point-à-Petre*, in *Guadaloupe*, for the purpose of privateering) *John Jansen v. The Brigantine Vrouw Christina Magdalena* and by the said *William Talbot*, or some or one of them, or by other citizens or inhabitants of the *United States*; and that the said vessel was fitted and equipped by order of them or some of them, in *Virginia* aforesaid.

That the said *John Sinclair* hath received lately, in *Charleston* or *Savannah*, divers large sums of money, and other property from the said *William Talbot*, as his share of prizes heretofore captured by the said schooner; and that the said *William Talbot* hath paid over the shares of the other owners to their respective orders, or to themselves. That the said *William Talbot* neither hath, nor, by law and treaty, can have any commission or authority whatever to seize, arrest, or take any vessel belonging to the *United Netherlands*. That the pretended commission to said *William Talbot* was issued and accepted when he was a citizen or inhabitant of the *United States*, is contrary to the laws of nations and of neutrality, and therefore void; and that any capture under pretence of such commission is in violation of the 13th and 19th articles of the treaty with the *United Netherlands*, and cannot vest in any captor any right to such pretended prize; nor divest the original owner of his just right: but that such owner has good grounds to demand, in this court, restitution of vessel and cargo so captured, and damages for arrest, spoliation, and detention.

That the said *William Talbot*, in collusion with *Edward Ballard* and others, hath broken open the hatches of the said brigantine, landed part of her cargo, broken open divers packages, and consumed and wasted the stores of the vessel; and would have sold the cargo, if he had not been prevented by process of this court. That there is fraud and collusion between the said *William Talbot* and *Edward Ballard*; that the two armed vessels are owned in part, or wholly, by the same

same persons, all of whom are citizens or inhabitants 1794.
of the *United States of America.*

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That the two vessels sailed in company from *Charleston*, on or about the 5th day of *May* last, were consorts, and cruized together, and together attacked divers vessels of powers in amity and treaty with the *United States.*

The replication further alleges that this court, having jurisdiction both as an instance and prize court, is competent to determine this cause, notwithstanding any treaty, the constitution of the *United States*, or the late act of congress, which gives jurisdiction to the district courts, in certain cases, only after the 5th *June*; but contains no clause limiting or prohibiting the jurisdiction, or preventing an appeal: it appears too that the brigantine was captured and brought within the jurisdiction of the court before the 5th *June*, viz. on 25th *May*. That, therefore, the plea should not be sustained.

A duplicate to this replication has been exhibited and filed, which states and avers that the brigantine was taken on the 16th *May*, on the high and open seas; that *William Talbot* is not a citizen of the *United States*, nor was he such on the 16th *May* aforesaid, but is and then was, a citizen of *France*. That his vessel was not fitted out, or armed as charged by the actor in his replication, but was legally armed and fitted out at *Point-à-Petre* aforesaid. That she is solely the property of *Samuel Reddick*, a citizen of *France* resident at *Point-à-Petre*, and is in nowise owned by any American citizen.

That his commission is legal, and the capture of the brigantine by virtue thereof is also legal, and not in violation of any treaty; and that as the capture was made beyond a marine league from the shores or coasts of the *United States*, this court is, by the late act of congress, deprived of jurisdiction herein. That if there were any fraud or collusion, as was pretended, but

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which he denies, (though he insists that such would be lawful on the high seas, as stratagem of war) yet the distance of the place of capture from the shores of the *United States* precludes all cognizance of the same by this court. And he avers that *John Sinclair* is not concerned or interested in the said privateer, *l'Ami de la Point-à-Petre*, nor was he so at the time of the capture; nor has he ever remitted any sum or sums of money on account of prizes taken by her, but that she belongs wholly to the aforesaid *Samuel Reddick*.

To this a triplicate or surrejoinder has been exhibited and filed in the usual style of the court, protesting against the aforesaid acts of the claimants, saving right of appeal, and relying on his libel and replication as good and valid in law, and praying as before for restitution and damages.

This is a cause of great importance, involving the law of nations, the faith of treaties, the rights of sovereignty and neutrality, the private rights of individuals, and the honour and justice of the *United States*. I have considered it maturely, and am prepared to give my judgment according to my best ability, faithfully, impartially, and agreeably to my view of the constitution and laws of the *United States*.

In doing so, I am much relieved by the consideration that my judgment will not be final; for both parties have claimed that right of appeal wisely provided for them, and to which, no doubt, they will have recourse.

The advocates on each side have, in the course of this investigation, entered into a vast field of argument; have contended for their clients, respectively, on a variety of grounds; and have displayed great ingenuity and legal knowledge.

To repeat these arguments would be unnecessary; I shall only allude to such of them as appear most material.

The principal points for the decision of the court appear to be

1st.

1st. Whether this court has any and what jurisdiction relative to matters arising on the high seas. 1794.
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2dly. Whether the 17th article of the treaty with France restrain such jurisdiction; or whether the act of the 5th of June last controls it. The Brigantine Vrow Christina Magdalena.

By the third section of the judiciary act of congress it is declared that there shall be a district court in each district to consist of one judge, who shall hold four sessions annually, and special courts at his discretion.

By the ninth section, the powers of the district courts are expressed, 1st, as to criminal, 2d, as to civil causes.

The court shall have *exclusive original cognizance* in all *civil* causes of admiralty and maritime jurisdiction; and *concurrent jurisdiction* with the courts of the *several states*, or the circuit courts of the *United States* (as the case may be) where an alien sues for a tort only in violation of the law of nations, or a treaty of the *United States*.

By the 2d section of the 3d article of the constitution of the *United States*, it is declared, that the judicial power of the *United States* shall extend to all cases arising under the constitution and laws of the *United States*, and treaties made, or to be made. To all cases affecting ambassadors, other public ministers and consuls, and to all cases of admiralty and maritime jurisdiction.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction; in all other cases, appellate jurisdiction under such regulations as congress shall make.

The *circuit* court has no *original* jurisdiction; but has *appellate* jurisdiction in causes of admiralty and maritime jurisdiction; in which

The district court *alone* has *original jurisdiction*.
Redress

1794. Redress must be had *there*, or nowhere. Suitors, however injured, would look in vain to the laws of this country for redress.

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They would be stopped *in limine*, and the appellate jurisdiction of the circuit and of the supreme courts would be virtually annihilated; since there would be no *terminus à quo*, no fixed point from which they might commence their procedure.

In addition to the clauses already recited from the judiciary act, the judges of the supreme court have by their decree in *Glass v. the Betsey*, (3d *Dallas Rep.* 6.) decided that the several district courts throughout the *United States* possess all the powers of courts of admiralty, whether considered as instance or prize courts. That case was elaborately argued, and with great ability. The judges of the supreme court held it under advisement for some days, and then decided it so fully as to leave the jurisdiction of this court no longer doubtful. The question was considered as well with respect to the law of nations, as to the 17th article of the treaty with *France*; and, was fully set at rest on both grounds.

But it is said that the act of congress of June 1 1794, by declaring that the district courts shall take cognizance of complaints, by *whomsoever instituted*, in cases of captures made within the waters of the *United States* or within a marine league of the coasts or shores thereof, intended to oust them of all *other* jurisdiction.

But the argument has no sort of force. *Glass's* case had established the jurisdiction of the court in cases of *neutral* or *American* property captured on the high seas and brought *infra praesidia* of our courts. It was there determined that, under such circumstances, the American citizen, or neutral, might institute his suit in the district court, and obtain redress from it. But the act of congress now relied on goes farther, and enacts that, if our jurisdictional limits are violated,

restitution

restitution shall be made even to a party belligerent 1794.
 who shall complain to the court, and prove his case to Joost Janzen
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tine Vrow
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 come within the provisions of that act. The sixth and seventh articles of the treaty with *France* assert and recognize the same right. *Holland, Prussia, and Sweden* have done so by their several treaties with us. No state could maintain its peace or sovereignty, if it were otherwise.

I have no hesitation, therefore, in pronouncing that the district court has full jurisdiction upon the present occasion.

I shall proceed to examine the claim and answer of *Talbot* upon the other grounds stated therein.

This claim is filed on behalf of the owners, officers, and mariners of the private vessel of war *L'Ami de la Point-à-Petre*, duly commissioned, armed, and equipped under the French republic; and all the above-mentioned persons are stated to be French citizens. The replication denies this; and we must examine the evidence to determine the fact. The exhibit (C.) by the claimant, proves that the said vessel was, on the 31st day of December last, called the *Fair-Play*, of Norfolk, in *Virginia*; was owned by *John Sinclair and Solomon Wilson*; was equipped by them with eight guns, one hundred weight of gunpowder, some shot, and sundry stores. That she was sold at *Point-à-Petre* by *William Talbot*, as agent or attorney to *Sinclair and Wilson*, to *Samuel Reddick*, a native of the *United States*, who purchased her as having a right to do so, being a naturalized French citizen, made such by the municipality at the above place, three days before. The American register was then cancelled, to be returned to the department that granted it, for the purpose of avoiding any penalty under our revenue laws.

The exhibit (A.) is a certificate from the municipality of *Guadalupe*, stating that *William Talbot*, a native

1794. native of *North America*, was, on the 28th day of *December*, admitted a citizen of *France*.

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Exhibit (E.) is a like certificate that *Samuel Reddick*, a native of *North America*, was, on the same day, admitted a citizen of *France*.

Exhibit (B.) is the commission of the governor-general of *Guadeloupe*, authorizing *Samuel Reddick*, living at *Point-à-Petre*, to fit out for war, under the command of captain *Talbot*, the said schooner called *L'Ami de la Point-à-Petre*. It bears date 2d *January* 1794.

The power of attorney from *Sinclair and Wilson* to *Talbot*, authorizing him to sell their vessel, is dated 24th *November* 1793. From these different exhibits it appears beyond a doubt that this vessel was fitted in the *United States*, with guns and powder.

That she sailed after the 24th *November*, because the power of attorney is dated on that day.

That captain *Talbot*, and the new owner *Reddick*, were made citizens on the 28th *December*. That on the 31st the bill of sale was executed, and that, on the 2d of *January*, she was commissioned as a privateer.

It has been insisted on that *Talbot's* answer must be taken as evidence, unless contradicted by more than one witness; because the oath of a party is equal to that of any other single person. This is only to be understood of cases where a party is *made* a defendant; but does not hold so strongly where a voluntary claimant comes forward to swear in support of his claim. In *Gilbert's Law of Evidence* (56) there is said to be a great difference between the evidence of an answer and a voluntary affidavit. *Talbot* could not have been examined as a witness in this case, because he is interested. Shall he then, avail himself of the rule of law by being a voluntary claimant?

Laying aside, however, for the present, any examination as to the ownership of the vessel, which does not seem

seem material, we will proceed to the question of expatriation, which has been brought forward in support ^{Janet Jansen} _{v.} ^{1794.} of *Talbot's* right.

I have perused with attention the cases cited on both sides as to the right of expatriation and emigration in the general manner there laid down, where no legal prohibition exists, and no prejudice is done thereby. The act of naturalization of congress, and the constitution of this state concur to sanction this doctrine: and we should with an ill grace refuse to our own citizens what we thus hold out to others. The proclamation of the president of the *United States* tacitly acknowledges the right contended for. It announces that no protection would be granted to such citizens as should by their own acts render themselves liable to punishment or forfeiture under the law of nations; and threatens prosecution against such as should, within the cognizance of our courts, violate the law of nations with respect to any of the powers at war.

Much time was taken up in inquiring whether the certificate of *Talbot's* citizenship was agreeable or not to the laws of *France*. If the question turned on that point, I should have no doubt that the certificate from the municipality of *Guadaloupe*, as it is duly authenticated, ought to be received in evidence. We have no right to inquire whether the governor conformed to their constitution or not. We know that the national convention has suspended many of the articles of the new constitution for the present; and who is to question their power to do so? But, while I admit this evidence so far, I think it incumbent upon me in this place to notice a variety of certificates, that have been made exhibits in this cause, from the French consul, and his chancery.

The 5th article of the consular convention with *France* fixes the right of the consular as to what acts he may

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tine Vrow
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may receive in his chancery; and declares that copies of such acts, duly certified under the seal of the consulate shall have such evidence, in the courts of the *United States*, as their originals would. Of the certificates before me, not one conforms to this regulation; and the consul of *France* must have been induced to give them either from ignorance of our modes of practice and rules of evidence, or to get rid of the importunity of the applicants.

Admitting, however, the validity of the certificate from the governor of *Guadalupe*, the question occurs: had *Talbot*, a citizen and native of the *United States*, any right to accept a commission to cruize against the subjects of the *United Netherlands*, who are under treaty of amity and commerce with us, even if his vessel had been altogether fitted in a foreign port? The 19th article of the treaty with *Holland* expressly says, that such persons shall be punished as *pirates*. The 15th article of the same treaty declares that all vessels and merchandize which may be rescued out of the hands of *pirates* and robbers, on the high seas, without the *requisite* commissions, shall be restored to the true proprietor. The 16th and 21st articles of our treaty with *France* are exactly conformable to the preceding article of the treaty with *Holland*. Now if a native and citizen of the *United States*, acting under a British or Dutch commission, had captured a French ship and brought her *infra praesidia* of our courts, we should have been required to restore, and must have restored her. The Dutch owners are equally entitled to our justice.

It is contended that the 22d article of the treaty with *Holland* says, that nothing therein contained shall derogate from the 9th, 10th, 17th and 22d articles of the treaty with *France*. If the 16th and 21st articles had been added to the above, this might have been strong ground; but it cannot be maintained that the

17th article (which gives permission to the ships of 1794.
war or privateers of *France* to carry their prizes where ^{Joost Jansen}
they please, without being subject to arrest in our ^V
ports,) is in any manner derogated from, when, on pro-
duction of their commissions, which they *are bound to*
shew, it appears that the captain and crew have, from
their connexion with the *United States*, violated *ano-*
ther treaty, for the due performance of which we are
equally bound; especially when that treaty is in strict
conformity with the 16th and 21st articles of our treaty
with *France*, under which we may, hereafter, be called
on to furnish redress in cases similar to the present.

If a native and citizen of the *United States*, guilty of
treason against them, should, in order to divest himself
of his allegiance, and get rid of the consequences of his
crime, expatriate himself, and, within three days after,
take a commission to act against us, such a step would
not, I conceive, exculpate him, or save him, if taken
again, from the punishment he would justly merit.
That one of our citizens should expatriate himself sole-
ly with a view to make war against those with whom
we are in treaty of peace and friendship, cannot amount
to *treason* against the *United States*; but involves con-
sequences not much less important, and can never be
sanctioned by our courts, or our private judgments.

The *quo animo* must enter largely into all considera-
tions upon this delicate question. For my own part, I
do not deny, generally, *Talbot's* right to expatriate him-
self, and become a citizen of another country. But I
assert that he has no right, in his new character, to *in-*
jure the country of his first and native allegiance, by
open violation of her treaties with friendly powers. If
he does this, he makes himself amenable to the justice
of that country; and, if found within her jurisdiction,
will be liable to the penalties established by her laws.

As to *Ballard*, all the facts stated against him in the
libel are admitted by his default, and proved by the

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evidence before the court. The commission from admiral *Vanstable* to *John Sinclair* appears to have been granted for special purposes; first, to prevent the sailing from *Norfolk*, of some vessels supposed to be fitting out there, with a view to give intelligence of the sailing of the French fleet: but, that having been previously done by the inhabitants of *Norfolk*, she was next employed as a lookout vessel, to prevent any surprise to the fleet in *Hampton Road*, or the carrying of intelligence by vessels out of the *Chesapeake*. The commission is dated on board the *Tigre*, on the 3d of *April*. The French fleet was then lying in *Hampton Road*, but sailed from thence on the 17th, and this vessel accompanied them. On the 20th she arrived in *Charleston*, not in distress, not armed: the embargo was then in existence.

Sinclair, to whom the commission had been granted, having stated to the French consul his inability to go to sea, the consul appointed *Ballard* in his stead. But, in so doing, he exceeded the powers given him by the consular convention, which relates altogether to acts of a *civil* nature, and to ships of a *civil* character. But the substitution in this case is of a *military* sort, and so the consul himself understood it; for, he states, in his letter to the collector, that the vessel is commissioned by admiral *Vanstable*, is destined by him to a secret service of importance, and must be allowed to go to sea, the embargo not relating to vessels so circumstanced. But the embargo comprehended all vessels *not military*; and the consul's power is restricted by the convention to those of a *civil* character. *Ballard* was, of course, substituted for *Sinclair* without due authority.

The consul's application to the collector bears date on the 3d of *May*. The brigantine was taken on the 16th. In the interval, it has been proved that *Ballard's* vessel went into the river *Savanna*, and there took on board

board guns and ammunition. She has since come into 1794.
the port of *Charleston* with her prize. If she ever was Joost Jansen
charged with secret despatches, or sent on a secret ex-
pedition, by admiral *Vanstable*, she has never executed
her commission. There is not a tittle of evidence to
shew that *Ballard* ever became a French citizen, or
went into a French port. The admiral's commission
to *Sinclair* was, as appears in evidence, no way impro-
per; it does not authorize a fitting for war, or the cap-
ture of prizes. Such commissions, given in our ports,
had lately been declared void by proclamation of *Fau-*
chet, the French minister. Such as had been previous-
ly issued, were, by that authority, recalled; and the
admiral knew his duty too well to contravene the same,
in a few weeks thereafter, and in breach of the laws of
neutrality, and of nations.

Ballard, therefore, had no authority to capture. The
claim put into the libel acknowledges this, and at the
same time confirms what his silence had before shewn,
viz. that the prize was taken from him, because he
could shew no commission. Had the matter rested
here, and had *Talbot* been duly authorized, this cap-
ture, unless collusion had been proved, might have
been good. But the evidence before the court proves
that they cruized in concert. That, on the following
day, they captured another vessel, and manned the
prize with a party from each vessel. When they were
threatened with recapture, *Ballard* took back his men;
and returned them on board the prize as soon as the
fear of recapture had vanished. And though *Talbot*
has sworn that he took the prize from *Ballard*, because
the latter had no commission, yet the prizemaster and
crews of both vessels remained on board, till her arri-
val in *Charleston*. It appears, too, that the capturing
vessels were in company, and did not separate till two
nights before.

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From such a mass of positive and circumstantial evidence I feel myself compelled to conclude that *Talbot* and *Ballard* cruized together by a concerted plan. That the prize was taken by *Ballard*, and collusively resigned to *Talbot*, because *Ballard* had no commission, and had armed and equipped his vessel in a port of the *United States*.

I do not call in question the general right of *France* to capture the ships and property of her enemies on the high seas, and to refer the question of prize or no prize to her own tribunals. But if *France* has belligerent rights, the *United States* have a neutral character to maintain, and neutral duties to discharge. I am influenced by that consideration, by respect for our own sovereignty, and by regard to the law of nations, in decreeing, and I do, accordingly, judge, order and decree that the claim of the above named *William Talbot*, and his plea to the jurisdiction of this court be dismissed with costs. And I do further order and decree, that the brigantine *Vrow Christina Magdalena*, with her furniture and apparel, and the cargo on board at the time of her seizure and detention, be delivered over to the actor in this cause on behalf of the original owners of the same.

This decree was affirmed both by the circuit and supreme courts. See 3 *Dallas' Reports*, 133.

Castello

Castello v. Bouteille et al.

1794.

March 18.

THE libel states that *Castello* was owner and commander of the brigantine *St. Joseph*, which was loaded in the port of *Carthagena* by himself and other subjects of *Spain*, which is in amity with the *United States*. That on the 22d of *September* last, in his way to *Cadiz*, he was captured on the high seas by the sloop *Fair Margaret*, commanded by *F. H. Hervieux*, and carried into *Cape Fear* river in *North Carolina*. That two days after their arrival within the bar of *Wilmington*, the said sloop and brigantine suddenly weighed anchor and proceeded to sea. This is said to have been in consequence of directions from the president of the *United States* to the governor of *North Carolina* to take possession of the brigantine and deliver her up to the libellant.

The libel further states that *Hervieux* then proceeded to *Charleston*, where, upon some agreement between him and the defendant *Bouteille*, the latter went to sea in the *Sans-pareille*, and, at some distance from the bar of *Charleston*, took possession of the brigantine, landed the Spanish crew in *Georgia*, and brought the vessel into *Charleston*. *Hervieux* and his people had previously quitted her.

The libel also states some proceedings respecting the brigantine and cargo in consequence of directions from the president of the *United States* to the governors of *North* and *South Carolina*, the latter of whom declined all interference. And the collector of *Charleston*, not thinking himself authorized to detain the vessel, she was finally left in the hands of *Bouteille*. Whereupon, by a decree of the consul of *France*, the said vessel and cargo were advertised and sold,

Jurisdiction
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the sover-
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sion.

The case is
not altered
though the
capture
should have
been origin-
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by a proscri-
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1794. *sold, except fifty bales of cotton, which were taken into the custody of the marshal of this court by a warrant issued therefrom.* The libel concludes by praying restitution of vessel and cargo, and compensation for the detention of the same.

The jurisdiction of the court is denied by a plea which states, that the *Sans-parcille* was a private vessel of war, duly commissioned by *France* to capture and make prize of all vessels, goods and merchandize found on the high seas, and belonging to the king of *Spain* or any of his subjects. That by virtue of this commission *Bouteille* captured this vessel and cargo on the high seas, and without the limits and authority of the *United States*. That by the 17th article of the treaty with *France*, this court is precluded from investigating the lawfulness of the capture and making any decree thereon. Plea concludes with a prayer that the suit may be dismissed with costs.

In support of the plea it was insisted that a neutral tribunal cannot determine the validity of prizes made by two belligerent powers from each other.

That the 17th article of the treaty with *France* is conclusive as to the present question.

That the 5th article of the convention with the *United Netherlands* compared with the 2d article of the treaty with *France*, to which it refers, is also conclusive.

That this question has already been decided in the district courts of *Pennsylvania* and *New-York*, against the jurisdiction, in cases not so strong as that before this court.

That on the face of the libel it appears that the question of prize or no prize is involved in this case.

That this court having no power to condemn, of course cannot restore. (*Lee on Capt.* 77, 78. 81. 220, 221. *Bynkershoek* 191. 194. 2 *Vat.* 263 to 265.)

That

That this court, not being authorized to decide the question of prize, cannot determine whether the first or second capture was legal, or whether either of the privateers was proscribed.

1794.

Castello

v.

Bouteille.

That the president, knowing this, referred the inquiry to the governor, and not to this court, as a matter properly cognizable by the executive, and not by the judiciary.

That the opinion of individuals ought not to operate with the court, the treaty being plain and conclusive.

That the jurisdiction of this court is defined by the 9th section of the act for establishing judicial proceedings, and does not extend to cases of captures.

The advocates for the libellant contend that this is a case of a peculiar nature, and must be determined on its own grounds, as it differs from any case in the books.

That the *St. Joseph* having been captured by a proscribed privateer, must be restored, into whatever port of the *United States* she may go.

That if the doctrine contended for on the other side should obtain, a neutral vessel may be cut out of our harbours or from our wharves, without redress.

That the president of the *United States* having already settled the principle, this court must restore if the present case comes up to that principle.

The opinions of the secretary of state, and solicitor-general of *Virginia* were produced, in which those gentlemen recommended an application to the judiciary.

Beaves, Lex Merc. 206. was quoted to support the jurisdiction of this court.

It was said that the question was not whether the treaty should be fulfilled; but whether this case comes within the treaty.

That if this court is deprived of jurisdiction in all cases

1794.

Castello

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cases of prize, it could not give redress for a breach of neutrality in our own harbours.

That the article of the treaty with *Holland* extended merely to matters of trade and navigation, and did not apply here.

From these pleadings and arguments, it appears to me that the court must decide three points.

1st. Whether the *St. Joseph* was the property of Spanish subjects, or not.

2d. Whether the capture was made by the citizens of *France* on the high seas, beyond our limits of jurisdiction.

3d. Whether this court has any jurisdiction, if the two preceding points should be determined in the affirmative.

As the libel states expressly the Spanish character of this vessel and cargo, it is unnecessary to say a word upon that part of the subject.

It is not contended by the libellant that the privateer was owned by other than *French* citizens, or that there is any defect in her commission.

But it is said that the original seizure was made by a proscribed privateer; and much stress is laid upon the subsequent interference of the president of the *United States*.

The court cannot notice this. The constitution has wisely separated the judicial and executive departments, and we must not infringe the barriers. At any rate the *Sans-pareille* was not within the president's censure; and if the *Fair Margaret* was improperly fitted out in our ports, and proscribed on that account, complaint must be made to the executive, who will proceed by negotiation to obtain the due redress.

Arguments are drawn from a comparison of the 5th article of the convention with *Holland* to the 2d of the treaty with *France*. Neither of them seems to me to apply to this case. The treaty with *France* is of a general

eral nature, and intended to be permanent under all circumstances of war and peace with *other* nations. The convention with *Holland* is distinct from our treaty with that power, and relates expressly to recaptured vessels, and to prizes made by either party on their *common enemy*.

As to vessels cut away from a wharf, or captured in our harbours, such acts would amount to felony or piracy and the court would not hesitate to exercise jurisdiction, independently of any treaty in existence. The citizens or subjects of foreign nations receive protection, and owe a corresponding allegiance; and what would be criminal in one of our own citizens would be equally so in them, while this state of things lasted.

The cases of the ship *William*, and brigantine *Catherine*, decided in the district courts of *Philadelphia* and *New-York*, though differing materially from the present, have been adduced to illustrate the point of jurisdiction. I have read both decisions with pleasure; they are ably drawn up, and are, I presume, correct, as no appeal from either has taken place. As to their being the opinions of individuals, I see no reason why that circumstance should deprive them of all right to consideration. Respectable character for legal knowledge, supported by sound argument and clear deduction, will always command respect as well in the case of a judge of the *United States* as in those of *Vattel*, *Bynkershoek*, *Puffendorf*, or *Beawes*.

But these opinions are confirmed by the language and conduct of the president of the *United States*, as contained and evinced in the letter from secretary *Jef.erson* to Mr. *Morris*, our minister in *Paris*. This proceeding of the executive has been submitted to both branches of the legislature, and has met with their decided approbation. This, it is true, wants the *forms* of law, and is not, therefore, binding upon a judge. If, however, his own opinion concurs, as mine does

1794.

Castello
v.
Boutellis.

1794. Castello v. Bouteille. in the present case, much satisfaction must be derived from the coincidence of sentiment with men so dignified by their wisdom and patriotism.

Upon the whole, I am clear that the plea in this case is relevant; that the libel must be dismissed; and that the fifty bales of cotton must be delivered up.

July 4th.

By the licensing act of the United States of 8th February, 1793, no coaster can be sold in a foreign port, unless her license be previously surrendered; nor is her American character changed by such transfer.

But if she be condemned for violation of law, and sold under order of court, she may become foreign property. So if the purchaser under the first *insuffi-*
ent title com-
of the act of congress
of 4th Aug.
1790. In ei-
ther case she
may be a
lawful priva-
teer under a cap-
tain of the schooner,
foreign com-
mision.

THIS suit, on the part of the *United States* is founded on the 8th and 32d clauses of the act for enrolling and licensing vessels employed in the coasting trade, passed 8th February 1793.

The 8th clause enacts that if any vessel enrolled and licensed conformably thereto shall proceed on a *foreign voyage* without first giving up her enrolment and license, and obtaining a register, she shall be liable to seizure and forfeiture.

The 32d clause enacts that if any licensed ship or vessel shall be transferred in whole or in part to any person who is not at the time of such transfer, a citizen

of and resident within the *United States*; or if such ship or vessel shall be employed in any other trade than that for which she is licensed, she shall, with her tackle, furniture and cargo found on board, be forfeited.

To support the libel, one witness, the deputy-collector, was called, who proved that this schooner on the 14th of *May*, during the continuation of the embargo, cleared out, by virtue of her license as a coaster, for *St. Mary's*, in *Georgia*.

It appeared from an exhibit filed by the claimant that the schooner *Hawke* was sold on the 10th of *June* at *Port-de-Paix*, to *Bolchos* the claimant, by *Cooke*, a captain of the schooner, in pursuance of orders from the owner, *Gohier*.

The

The district attorney contended that this vessel was 1794. proved to have departed to a foreign port, without ^{United States} having delivered up her license, as the 8th section of ^{Schr. Hawk.} the act directs; that she was, therefore, forfeited. That when in a foreign port, she was sold to a foreigner, for which she is declared by the 32d clause to be forfeited. And that on these grounds she must be condemned in this court.

It was insisted on the part of the *United States* that upon proof of a violation of the revenue laws, the court cannot inquire into the motives or causes thereof. That if no fraud is intended, the secretary of the treasury has power to mitigate or remit penalty, upon being satisfied by the judge of the probable innocence of the party. But that the court, in the first instance, is bound to decree according to the letter of the law.

That the general rules for construction of penal statutes do not apply here; and that great injury would arise to the *United States* by practices of this sort. That though by the 9th clause there was some appearance of relief, which might be brought forward as operating against the 32d clause, yet that upon a careful investigation it would be found not to apply.

1st. Because the sale contemplated in the 9th clause can only mean sale to a citizen of the *United States*, and not to a foreigner; otherwise the law would be inconsistent.

2d. That sale to a foreigner being prohibited, the words "*any district*" must be construed to mean sales at sea, which are expressly mentioned in the act of December 1792. That by the rule of law, all the clauses of the act must be construed together, to make them consistent, and that the condemnation of this vessel must then follow of course.

The 5th and 9th clauses of the act having been relied on as explanatory, and as doing away the 8th and 32d, we must examine them. The 5th only says that licensed

1764 licensed vessels shall be no longer privileged when United States they cease to be wholly owned and commanded by Sahr. Hawke. citizens of the *United States*.

The 9th clause provides that the license shall be delivered up within three days after the expiration of the year for which it was granted, to the collector of the district where it was granted, if the vessel be at that time within that district; if not, within three days after her next arrival within that district. If such vessel be sold out of the district, the license must be delivered up within three days after the arrival of the *master*, within *any* district, to the collector of such district; under penalty of fifty dollars.

This relates only to *expired* licenses; and neither of these clauses applies to the present case.

In the 7th clause of the act for *registering* vessels we find that if *registered* vessels are sold or transferred in a *foreign* port or *at sea*, the master is obliged, within seven days after his arrival within any district (the same words used in the 2d clause of the licensing act) to deliver up the certificate to the collector of such district. This furnishes a clue to the intention of the legislature.

The *registering* act permits sales of vessels in a *foreign* port, or *at sea*, to *foreigners*. The licensing act prohibits a sale to foreigners altogether. The licensed owner may indeed dispose of his vessel, upon delivering up his license; but not otherwise.

The 9th clause restrains all sales, out of the district, to citizens and residents of the *United States*; and as the 8th clause makes liable to forfeiture all *licensed* vessels proceeding with their license to a foreign port, the *place of sale* can never be extended so as to include those ports; but must mean *at sea*, on the *coasts of the United States*, or on the fishing banks, where many of these vessels are employed, and, probably, often transferred: in either of which cases the master must report the sale and deliver up the license within three

three days after the arrival of the vessel in *any district*. 1794.
To this view of the licensing and registering acts, and ^{United States} of the different clauses of each, we may with advantage apply the rules for reconciling statutes with themselves, and with others in *pari materia*.

To justify the proceeding in this case, the French consul has certified that he hired this vessel to carry despatches to *St. Mary's*, in the state of *Georgia*. This was lawful; but it will not be supposed that the consul meant thereby to assist an evasion of our laws. The certificate, therefore, can avail nothing.

Two letters have been filed as exhibits which give reason to conclude that the schooner cleared out for *St. Mary's* merely to colour other designs.

The answer states that the vessel was to go first to *St. Mary's*, and if the *Las Casas* was not there, was to be further directed by *Bolchos*, who carried the consul's despatches. It also appears from the answer that she never went to *St. Mary's* at all, but proceeded immediately to *Port-de-Paix*, where, on the 10th of June following, she was sold to *Bolchos* who went in her as passenger, and whose directions the captain was ordered, by his owner, to follow. These circumstances, and the caution of the captain in returning his coasting license as soon as the vessel was sold, prove clearly that the plan was fixed before she was sold. Both captain and owner knew that the license ought to have been given up before the vessel sailed on any other than a coasting voyage; but then the embargo stood in their way. To evade this they had recourse to the contrivance of which they must now abide the consequence. The libel rests on the 8th and 32d clauses of the licensing act. The answer admits a transgression of both. But the claimant says he was an innocent; *bond fide* purchaser in market *overt*; that the forfeiture must relate back to the time of sale; that it could not attach, unless the vessel remained of the same description

1794. *tion as when first licensed; that the breach of the law United States preceded the transfer, and, as no decree of forfeiture Scho. Hawke had passed previously to the sale, the vessel did not come within the act.*

If arguments of this sort should receive weight in this court, the laws would be nugatory. "Such an ex-
"position of statutes must be made as to prevent their
"being eluded; and if their meaning is *doubtful*, the
"*consequences* are to be considered, in the construc-
"tion of them; but if the *meaning* be *plain*, *no conse-*
"*quences* are to be regarded, for that would be as-
"*suming legislative authority.*" *Bacon*, 652.

In this case there is sufficient proof that the 8th and 32d clauses of the act of congress for licensing coasters have been infringed. I decree therefore that the schooner *Hawke*, with her tackle, furniture, and apparel, be condemned as forfeited to the *United States*.

Kelley, jun. v. Schooner Prosperity and Cargo, and John Cooke.

Sept. 15.

IT appears from the preceding decree that the *Hawke* was sold on the 10th of June last at *Port-de-Paix* to *Bolchos*; by *Cooke*, who was master of her when she cleared out as a coaster to *St. Mary's*. On the same day, 10th June, *Cooke* informs his owner of this sale, by letter; and incloses him the schooner's American papers, obviously for the purpose of having his custom-house bond cancelled.

Two days after, 12th June, *Cooke*, with a French commission, sailed from *Port-de-Paix*, in this very schooner, then called *La Parisienne*, armed, and having *Bolchos* on board, as owner. On that day they made prize of the *Prosperity*, a British vessel from *Jamaica*; and on the 27th following, brought her into this port.

On plea to the jurisdiction, the judge recapitulated the circumstances of fraudulent contrivance by which this

this pretended privateer had evaded the embargo, and escaped from this port by means of her coasting license. He was decidedly of opinion that the sale of this coasting vessel at *Port-de-Paix* was illegal, and did not change her neutral character. That upon her return *infra praesidia* of this court, she must be considered as American property, never divested out of the original owner. *Bolchos* could have no just title, but from the court, after condemnation, and compliance on his part with the requisites of the act. He observed that if our coasters could thus, under French commissions, capture neutral vessels, they would all be converted into privateers, and the laws of this country set at defiance.

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Kelley
v.
Sah. Propre-
rity.

The plea to the jurisdiction was dismissed.

British Consul v. Schooner Favourite, and Alexander Bolchos.

BOLCHOS afterwards availed himself of the 66th clause of the act of congress of 4th August 1790, and petitioned to have the schooner *Hawke* delivered up to him as *owner*, on his giving bond with sufficient security to abide the decree of the court. A warrant of appraisement was accordingly issued, the other requisites of that act were complied with, and the vessel with every thing belonging to her was transferred to the claimant accordingly. She then sailed from this port as French property, with the same equipment, crew, and commission, that she had obtained at *Port-de-Paix*. On the 12th March 1795 she captured the British brig *Favourite*, and brought her into *Charleston*, where the British consul libelled her. *Bolchos* pleaded the 17th article of the treaty with *France*, in bar to the jurisdiction of this court.

The judge sustained the plea, and dismissed the libel with costs.

Stannick

Stannick v. Ship Friendship.

1794.
August 18th.

A French
armed ship,
duly com-
missioned,
but fitted out
here, may
bring in and
carry away
her prizes,
without be-
ing subject
to the juris-
diction of
this court.

THE libel states that this ship, belonging to British subjects, was captured on the high seas on the 26th June last by the privateer schooner *Montagne*, and brought into *Charleston*. That said schooner was formerly called the *Robert*, is American built, wholly fitted for war in this port, and despatched from hence on a cruize, without having any legal commission: contrary to the laws of the *United States*, and to the regulations established by the president; and contrary also to the law of nations, &c. Libel denies that any commission issued to a vessel thus equipped could be legal, as against nations at peace with the *United States*. It sets forth an equipping in this port by taking off quarter deck, cutting port holes, and arming with fourteen carriage guns. It states that she was officered and manned here, and sailed from hence on the 4th March last, on a cruize; and returned on the 26th April following, as a French privateer, without having in the meantime entered any port or place within the jurisdiction of *France*. Restitution is prayed of the *Friendship* and cargo, with damages. The regulations of the executive of the *United States* respecting the equipment in our ports of vessels belonging to foreign powers are filed with the libel as an exhibit.

A plea to the jurisdiction of the court has been put in, and it alleges that at the time of this capture, the schooner was, and now is, duly commissioned by the French republic; that she was legally fitted out, belongs to French citizens, and authorized to cruise against the enemies of *France*. That by the law of nations, the treaty with *France*, and the 6th section of the act of congress of 5th June last, this court is precluded from holding plea of the present matter.

With

With the plea are filed, as exhibits, a copy of the 1794. commission to *La Montagne*, registered on the 25th ^{Stannick} March last, and a condemnation of the schooner *Robert* ^{v.} ^{Ship Friend-} ^{ship.} as French property, at *Nassau* in *New-Providence*, on the 26th *July* 1793.

This sentence is conclusive against any pretence that this schooner was *American* property; because by the revenue laws of the *United States*, she could never become such. But it is contended that this case is like that of *Talbot* and *Jansen* (*ante page 13.*) and must be decided upon the same principles. But the law there laid down, and supported by 1st *Vattel* 144, 5. and 2d *Vattel* 7 and 8. is that if a neutral nation grants the privilege of equipment in her ports to *one* belligerent, she must grant it to *another*; by treaty with *France*, no citizen of the *United Netherlands* could have been allowed to arm against her; of course, the rule of neutrality required that *France* should not arm in our ports against the Dutch.. The only feature in this case resembling that of *Jansen* and *Talbot* is that both privateers were originally fitted out here: *There* the equipment was made by *American* citizens; *here* the property is *French*, and the commission expresses an arming for her own *commercial protection*, as well as for the purpose of *cruizing against enemies of France*. This brings her within the very regulations relied upon by the libellants, the 5th clause of which allows that any vessels of *France* of a *doubtful character*, as being calculated for *commerce or war*, may be equipped in our ports. The 6th clause excludes from this privilege all powers at war with *France*, and seems thereby tacitly to admit that such *French* vessels *might* arm here. The officers of the customs appear to have thus distinguished, for they have given no notice of the equipment of the *Montagne* to the governor, or district attorney, which the instructions say they shall do, in case of any contravention

1794. contravention thereof. If this be so, shall the subsequent commission lessen a right to capture? I think not. If, indeed, the capture had been made before the commission was received, a question might have arisen between the captors and their sovereign, the latter of whom might, perhaps, have claimed. Much stress has been laid upon the date of this commission. It issued from the marine office in *France* on the 5th *December* last, was examined and certified by the governor of *Guadalupe* on the 10th of *March*, (six days after the schooner sailed from hence) and registered at *Point-à-Petre* on the 25th of *March*. This was twenty-one days after the sailing from *Charleston*, and gives sufficient time for receiving the commission at *Point-à-Petre*, previously to the capture of the ship *Friendship*, on the 26th of *June* following.

In *Jansen and Talbot*, our treaty with *Holland* was infringed; and though, by the law of nations, the bringing *infra praesidia* of a neutral nation might justify restitution in *any* case, yet our treaty with *France* (17th article) has expressly altered that law in cases like the present, where the commission was granted in a *French* port to *French* citizens.

Upon full consideration of the pleadings, arguments, and evidence of this case, I am of opinion that the libel must be dismissed.

Don

Don Josiah Ramon de Salderondo v. Ship Nostra Signora del Camino and Hervieux & al. 1794.

September
8th.

IT appears from the pleadings and evidence produced in this cause that this ship, the property of Spanish subjects, sailed from *Cuba* in *May* last, with a valuable cargo, bound to *Spain*. That on the 23d *May* she was captured on the high seas by the armed schooner *Minerva*, commanded by *Hervieux*, who put a prize master and crew on board, and ordered her for *Charleston*. That two days after the *Sans-pareille* privateer joined them at sea, and also sent some men on board. That on the arrival of the prize at *Charleston*, she was entered at the customhouse as prize to the *Sans-pareille*: and that the cargo has been sold to several persons.

It appeared in evidence that the *Minerva* was a French bottom, built at *St. Domingo*, and fitted out in the year 1792, to act against the brigands in that island. That on the breaking out of war she was the first vessel equipped and commissioned to cruize against the enemies of the French republic, and that she made some prizes. That when the British took *Jeremie* in 1793, this schooner was in the harbour, and was carried off by seven Frenchmen who passed the forts, notwithstanding they were fired upon. That she was soon after taken and carried to *Jamaica*, from whence she sailed again as an English privateer to cruize against the French. That she was then captured by the *Atalanta*, a French privateer, and sent to this port as prize. That she remained here from the month of *January*, till *May*, when she sailed from this port, and was reported at the customhouse as prize, both at coming in, and going out.

It appeared that she had eight guns and eight swivels mounted, and two guns and two swivels in the hold;

The courts of the United States cannot question the validity of the commission of a French privateer, whose prize is brought into our ports, by virtue of the 17th article of our treaty with France. What alterations in the equipment of such privateer will amount to a breach of neutrality.

1794. hold; and that she was pierced for twelve guns. That she had also on board several boxes of arms at the time she was taken by the *Atalanta*, and that she had been furnished with new sails at *Jamaica*. The collector proved that she was reported and entered at the customhouse as having ten guns. That she went out with that number, and was not armed or equipped here. No proof was offered of her having any other commission than that under which she sailed before she was taken by the British.

Two witnesses proved that she had received repairs in this port. Her quarterdeck was cut down, and main-deck laid flush, and four new swivel stocks were put up. She had a new foremast, sweeps, and new spars fore and aft, and some new sails. She was also furnished with ringbolts, bolts, iron stanchions, and an iron tiller.

Five exhibits were filed, but are inadmissible, except the copy of the *Sans-pareille's* commission. Indeed, after the rejection of many of the same nature, not coming within either the letter or the spirit of the consular convention with *France*, I was rather surprised to find these introduced. In future, that the proceedings may not be too voluminous, I shall consider such exhibits on their first production, and admit or repel them then.

It was contended for the actor that all fitments for war in the ports of a neutral nation are illegal. That the law of nations protects *Spain* in this respect, though we have no treaty with her. That capture by a vessel having no commission, is unlawful; and prizes so taken, if brought into a neutral port, must be restored. That no change of property can take place before condemnation by some authorized tribunal; and that as the *Minerva* was made an English vessel by capture and condemnation, her original French character could only be restored in the same way. That by the

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ra del Cami-
no et al.

the marine law of *France*, certain regulations must be complied with before a commission to cruize will be granted; and that these regulations were not observed in this instance. That as *Hervieux* had no commission, he could have no right, and could transfer none to the captain of the *Sans-pareille*. That as no *jus post-liminii* could apply to the vessel, after condemnation, neither could it renew the efficacy of the commission. That, even if the original commission could have survived, it must inure to the original possessor, and not to *Hervieux*. *Molloy* (pages 9, 41) was quoted to shew a distinction between prizes made by public ships of war, and such as are made by privateers, and letters of marque; which last, if brought into a neutral port, before condemnation, must be given up. And it was added that, by more modern authorities, even public ships of war were subject to the same law. That though the 17th article of the treaty between the *United States* and *France* allows a temporary asylum, yet as no condemnation has taken place, and the property been sold here, the original owners may recover it.

The claimants, in support of their plea to the jurisdiction, rely on the 17th article abovementioned, as conclusive. They admit that by the general law of nations, property captured and brought into neutral ports may be delivered to the original owner; but they contend that the treaty alone must decide this case. That this treaty is the supreme law of the land, and takes away all jurisdiction from this court.

It was also conceded that the court could grant redress in the following circumstances.

1st. Where American citizens capture the property of a nation, as the Dutch, with whom we have a treaty to the contrary. Such was the case of *Talbot and Jansen*.

2d. Where French citizens capture American property,

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Ramon de
Salderondo
v.
Nostra Signo-
ri del Cami-
no et al.

1794. party, and bring the same *infra praesidia* of the courts of the *United States*.

Ramon de Salderondo

Nostra Signora del Camino et al.

3d. Where the capture is made within neutral limits.

4th. Where the capturing vessel has been equipped in our ports, contrary to the rights and duties of neutrality.

It is contended, however, that the present case does not come within either of these classes. That the citizens of *France* may rightfully capture the vessels of her enemies, with or without a commission, so far as concerns neutrals. That, in this case, the property having been sold, and passed into the hands of a third person, the *spes recuperandi* is gone. That the repairs made to the *Minerva* in our port were lawful, and that all the powers at war were privileged to the same extent. That the act of congress of 5th June 1794, had settled the limits of jurisdiction in this court, and that they did not comprehend the present case.

From this view of the evidence and arguments it is clear that the interference of this court can only be justified by such equipment of the privateer in this port as contravened the laws of neutrality.

All the cases, from *Molloj*, *Vattel*, *Bynkershoek* and others, relative to delivery up of prizes brought into neutral ports before condemnation, are superseded by our treaty with *France*. This has altered the general law of nations *quoad* the parties thereto, and all independent nations have a right to do this. Authorities to support the position are too common to need enumeration. Great stress was laid on the marine law of *France*, as containing indispensable regulations without due attention to which no lawful prize could be made. This might have weight before French tribunals on a question of right between the uncommissioned captor and his sovereign; and the *lex loci* might well apply. All the civil law writers admit that the prize

prize might be made for the benefit of the sovereign; 1794.
and it has been doubted whether the nation suffering
by such unauthorized capture might punish the captor
for piracy, if he should fall into their hands. But it
never was supposed that a neutral nation could do this.

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Salderondo
v.
Nostra Signo-
ra del Cam-
po et al.

It must also be conceded that a distinction was formerly taken between national and private ships of war, as to the restitution of prizes brought into a neutral port. But this difference is no longer made; and the whole matter seems finally settled by modern decisions, particularly by the case in *4th Durnford and East*, 366, 387, which must enforce conviction wherever it is read.

In the case of *Jansen and Talbot*, the prize was restored because our treaty with *Holland* had been violated. No such thing is pretended now. This vessel has been proved to have been originally French, and this court will not inquire into the circumstances of her capture by the British, and subsequent recapture by a vessel of her own nation. She came into our ports armed and equipped for war; and the alterations and repairs made during her stay here did not amount to an infringement of our neutral rights. The fixing of four new stocks for swivels, and procuring two carriages for the guns in her hold *might* have brought her within the act of the 5th June; but she had sailed previously to the passing of that act. The president's instructions permitted such alterations and additions, even if doubtful in their nature, as regarded defence or war; and all the belligerents were entitled to the same privilege.

Upon the whole, I consider the 17th article of our treaty with France as conclusive against the jurisdiction of this court, and I dismiss the libel with costs.

Bray

1794.

Sept. 22.

If a voyage
be interrupt-
ed without
the fault of
the crew
they shall re-
ceive wages VOYAGE.
during the
time they
work on
board the
vessel in
port. The
act of con-
gress for the
regulation of
merchant
seamen must
be strictly
followed, it
being penal.
If the mari-
ners suffer
imprison-
ment under
the 7th
clause of
that act,
they shall
not also for-
feit wages
under the
5th clause.

Bray and others v. Ship Atalanta.

THIS is a libel for wages. The ship was bound on a voyage to *Liverpool* and back; the actors ship-ped at different times in the month of *June* last, and signed articles with captain *Wilson* to proceed on the

On the 4th *July* the ship attempted to pass the bar, but struck, and made so much water, in consequence, as to be forced back to *Charleston*. This took place on the 29th *July*; and on the 2d *August*, captain *Wilson* left the ship. On the 5th captain *Hazard* took com-
mand of her, on which all the men quitted her, and went on shore: some of the crew, however, returned and went to work under the new captain. The others, among whom were several of these actors, were taken up and sent to jail under the 7th section of the act of congress for the regulation of seamen. They applied to this court for a discharge, suggesting that the ship was unfit for sea, and requested a survey. This was ordered, and they were directed to return on board and do their duty. On the day following, they went on board and carried the vessel up to *Gadsden's wharf*. From the logbook it appears that they remained on board, more or less, until the 24th of *August*, when they all left the ship, and have not since returned.

It appears also by the logbook that the seamen were dissatisfied at several times, and though no reason is assigned, yet it appears from a letter of the owners that upon their insisting that the vessel should go to sea, the men refused to proceed in her.

Three circumstances have been stated as material in all contracts with seamen.

1st. That the vessel be sound. 2d. That the captain be known to them, and one on whom they may de-
pend

pend for their wages. 3d. That the voyage be certain 1794.
and defined.

Bray et al.

v.

Ship Atalanta:

It is contended that, in this case, the two first requires fail; that the seamen are no longer bound by their articles; and that their wages are due. That they are not within the act of congress. That a change of captain is a breach of the articles, and that an equitable construction should be given to the contracts of seamen. (*Hopkinson*, 122.)

It is clear that this vessel is not seaworthy. A survey has been made, and it appears that the ship must be unloaded. When these men went on board the second time, the voyage appeared to be at an end. The original captain and the mate had quitted; all the passengers had removed their baggage, and come on shore. This is a state of things not contemplated at the signing of these articles, and must be taken into consideration by every court acting upon equitable principles.

As to the change of captain, I do not think it justifies the seamen in leaving a ship after they have signed articles to proceed on a definite voyage; for, although the contract is made with the captain, yet it is chiefly on the credit of the vessel that they depend for their wages. And if the vessel be lost, it cannot be said that they would have a claim on the captain personally. The captain may die, or be dismissed by the owners, after articles signed; but this would by no means discharge the seamen. The vessel, the owners, and the new captain would be liable to their claim for wages, and, as contracts are mutual, they are also bound. As to the *certainty of voyage*, the articles are sufficiently express.

The circumstances of this case are of a peculiar kind, and the regulations of the act of congress have not been duly attended to. If, on the first refusal of

G

the

1794. the men to do their duty, (because the captain was changed) the directions of the act had been followed, I do not think I could have interfered; but it is a penal law and must be construed strictly. The act requires the name of *each seaman* absenting himself to be entered in the logbook; this was not done: a general entry "that the mate and all hands had gone ashore" is all that appears. At this period, the owners had an option of sending these men to jail, under the 7th section of the act; or of resisting payment of their wages, under the 5th. They chose the former, and cannot have both remedies.

Gammon, the mate, and *Cole*, the steward, are not on the logbook at all. They, therefore, cannot be affected in any way by the act. The other parties to the suit, after they were taken from jail, continued in the ship till she returned to *Gadsden's* wharf. The logbook specifies their working on board from the 13th to the 23d of *August*. On the 24th the logbook states that "*the people were all absent*," whereas they should have been severally named.

It is laid down in 3d *Bacon*, 594, "that if a contract be made with seamen to go a voyage, and they, in order thereto, work in a harbour, and afterwards the voyage be interrupted through the owner's fault, (as if the ship be arrested for debt; &c.) the seamen shall have their wages for work done in the harbour." This seems applicable to the case before me, for though the owners are not in fault, the hardship upon the seamen would be equal, if they should lose what they have earned.

Upon the whole, I cannot decree a forfeiture of wages, because the act of congress has not been complied with; yet as there has been much to blame in the conduct of the men, and as the owners have been compelled to hire others in their room, I shall not saddle

the latter with double expenses. I therefore ad. 1794.
judge and decree,

Bray et al.

That *Gammon*, the mate, having quitted the vessel ^{Ship Atlanta}, on the change of captain, and thereby sanctioned, in some measure, that conduct in the rest, shall be satisfied with one month's wages in advance, which he received on signing the articles.

That *Cole*, the steward, who has received ten dollars in advance, receive ten more, as all to which he is entitled.

That the seamen who have been imprisoned receive their wages, as stipulated in the articles, from the time they respectively signed them, until the 24th *August*, when they finally left the ship; deducting, however, any sums that may have been advanced to them, and also their pay from the 5th *August* to the 18th, during which time they were not on board. Let each party pay his own costs of suit.

Peter Martins v. Edward Ballard and William Talbot.

October 1.

THIS is a libel for damages. The evidence is, in all material points, the same that was produced in the cause of *Joost Jansen v. the Magdalena* and these defendants; except only as to the matter of damages. I shall not, therefore, recapitulate that evidence; the former case having been so recently decided.

The proceedings are, now, in *personam*; but the principles of both cases, as relates to the law of nations and to treaties, are the same. The plea to the jurisdiction of the court is made as by *Talbot*, with this difference, that, upon the former occasion, *Ballard* made default, and every charge was of course taken, as against him, *pro confesso*. Here he has pleaded, and

Damages will be assessed in this court, upon a libel in personam, for commission of trespass or tort upon the high seas.

1794.

Martins
V.
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and his advocate relies upon ground not taken in the first case. I shall consider the arguments by which it is contended that a difference exists as to the merits.

The former decree was founded on the 19th article of the treaty with the *United Netherlands*: It is said that *Ballard's* commission does not come within that article.

It is also contended that the schooner *l'Ami de la Liberté* is a vessel belonging to the French republic, and therefore not within the letter or spirit of the 19th article of the treaty with *Holland*. That any American citizen may lawfully command a public vessel, under French authority, and may of right examine, on the high seas, vessels belonging to neutrals or to the enemies of *France*. *Mollov*, 1. 3. 12.

That captain *Martins*, having made resistance to such examination, must abide by the consequences of his own imprudence.

I have already declared my opinion of the authority under which *Ballard* acted. It runs thus:

"In the name of the French people. On board the
" *Tigre*, 13th of *Germinal*, 2d year of the republic, &c.

"Peter John *Vanstable*, rear admiral commanding a
"division of the naval forces of the republic, stationed
"on the coasts of the *United States of America*.

"In consequence of the offer of citizen *Sinclair* to
"enter, voluntarily and from pure love of liberty, into
"the service of the French republic, and the engage-
"ment on his part to conduct himself altogether as a
"good French republican, I give him an order to take
"command of the schooner '*l'Ami de la Liberté*,' and
"to fulfil the commission confided to him by me."

(Signed) Rear admiral *VANSTABLE*.

"We *Anthony Louis Fonsportuis*, consul of the
"French republic, charged with the consul's office at
"Charleston, certify to all whom it may concern that
"the

"the citizen *John Sinclair*, having declared to us his
"inability to go to sea, requires us to transfer the pre-
"sent commission to the citizen *Edward Ballard*.
"We have therefore transferred the said commission
"to the said *Ballard*, to be executed by him in the
"place of said *Sinclair*."

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v.
Ballard and
Talbot.

Given at the consul's office.

This commission, however legal for the purposes mentioned in it, was illegal when applied to others, so different from its tenor; and *Ballard* was highly criminal in so converting and abusing it.

What proof is offered that this vessel belonged to the French republic? The admiral's commission does not describe her as such; nor is she so called in the consul's letter to the collector of *Charleston*. He says, only, that she is under a special commission of admiral *Vanstable*, charged by him with a secret expedition. That it is indispensable that she should be allowed to go to sea; and that she does not come within the embargo. But he does not say she belongs to the republic.

If we examine the evidence of Mr. *Airs*, we shall find that at the time when she was employed by admiral *Vanstable* in the business committed by him to *Sinclair* (which both *Airs* and *Sasportas* explained to be unrigging and prevention from sailing of certain vessels at *Norfolk*) he (*Airs*) sailed in her from the fleet to that place. She was then, he says, commanded by *Ballard*, and *Sinclair* appeared as a passenger on board. He says further: that she was raised from a pilotboat, and was fitted with railing and stanchions, and a streak above the wale, for guns.

When she arrived here, she came in under American colours: *Wallace* the boarding officer, minuted her as a *Virginia* pilotboat, armed in *Norfolk*. The collector says she was entered as such, by *Sinclair*; that
he

1794. *he alone managed all that related to her at the customhouse, even after she had been transferred by the consul to Ballard. Add to this Craig's evidence, and no doubt can remain as to her being private, not public property. Here is, indeed, proof positive from the acknowledgment of Sinclair himself, and of Talbot, that she was owned in part by Sinclair, whose partnership with the French republic is too ridiculous to be credited. All reliance upon the ground of her being a public vessel of that government must fail.*

As therefore Talbot, under the treaty with Holland, was not at liberty to capture Dutch property; as Ballard's was a private vessel, and himself incapable of making lawful capture, for want of a lawful commission; I can do no otherwise in this case than I did in that of Joost Jansen against the Magdalena. I must sustain the jurisdiction of this court, and declare the proceedings of both these defendants to be wholly illegal.

It remains to inquire whether the court has any, and what, further jurisdiction in cases of this nature.

The 9th section of the judiciary law of congress vests this court with exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. This necessarily includes all matters arising on the high seas, of a civil nature; all contracts, torts and trespasses; and, by the law of nations, is extended to all civil contests between our own citizens, and between foreigners, as to the right of property which has been illegally and piratically taken on the high seas. Such property, may if retained, and brought within the jurisdiction of the court, be restored: and equivalent damages may be given, if it has been disposed of. The court may proceed *civiliter*, even where it is, expressly, without criminal jurisdiction.

In *Le Caux & Eden* (Douglas 582) it is shewn, by two cases, that the court of admiralty in England, sitting

ting as an instance court, restored property taken by pirates, who had not been apprehended.

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The supreme court of the *United States* having, in *Glass's* case, decided that this court is possessed of all the powers of a court of admiralty, whether as an instance or prize court, it must be authorized to inquire into, and to determine the quantum of damages and costs in all cases of trespass or tort.

The case from *Douglas* above reported is supported by that of *Livingston v. M'Kenzie*, in 3d *D. & E.* 333. And similar proceedings have been had formerly in this court, as appears by reference to its records. I will, at present, content myself with mentioning the case of *Walton and Jeamans*, in *August 1748*. There the defendant was condemned to pay 500*l.* for unlawfully capturing and entering the libellant's vessel, and taking therefrom the goods, wares, and merchandize enumerated in the libel. *Hopkinson's Rep.* 137, is full to the same point, viz. the power this court has to assess damages in *personam*. I shall proceed to do so in the case before me.

It is pretended by the defendants that they boarded the actor's vessel (*Fortune der Zee*) merely for the purpose of examining her. Why then did they, in the first instance, order her to strike? and why, after boarding her, and finding that she was *Dutch* property, did they not relinquish the prize? Their conduct, on the preceding day, in the case of the *Magdalena* makes their *real* intentions too plain. But the bringing off the captain and crew of the *Fortune*, when they found themselves obliged to give up the ship, serves to shew that the folly of their conduct was equal to the guilt of it: for had they been left, the vessel would have proceeded on her voyage, and the trouble and expense of this suit would have been spared.

It has been proved that the sails and rigging were much injured; and though this has been attributed to the

Cases adjudged in the

1794. the circumstance of the vessel's going into the *Havanna*, it is neither probable that it was so, nor was any evidence adduced to support the assertion.

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v.
Ballard and
Talbot.

I find by reference to merchants of respectability, well acquainted with such business, that the amount of damages done to the sails and rigging could not be less than

Dollars 500

The pay and wages of a captain and seamen to navigate her to *Holland* is, at least,

300

I make no allowance for demurrage at the *Havanna*, as it appears that the vessel waited there for the fleet, not choosing to sail alone.

From statements in the libel, which are not contradicted, and from information of the witnesses, I calculate captain *Martins'* damage, by loss of clothes, plate, &c. at

Dollars 750

His pay as captain, from 18th *May* to 18th *December*, (seven months) when he may probably get back to *Holland*, amounts, at thirty dollars per month, to

210

His expenses here for four months, at thirty dollars per month,

120

Counsel's fees

150

Total amount	Dollars	2030
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Of this sum I decree to the owners of the ship,

Dollars 800

To the captain, as above,

Dollars 1230

As both defendants were included, by consent of their counsel, in this decision, I adjudge and order that each of them pay one moiety, say ten hundred and fifteen dollars, of the above total amount; and that they pay the costs of suit.

I direct further that twelve hundred and thirty dollars

lars be paid to the captain of the *Fortune der Zee*; and the remaining eight hundred deposited in the branch bank here, till applied for by the owner or owners of the ship, or their authorized agent.

1794.
Martins
Ballard and
Talbot.

William Herron v. Schooner Peggy.

October 21.

IT appears from the articles and evidence produced in this case, that the actor, on the 9th October 1793 shipped in this port, as cook of this schooner, at ten dollars per month. That he performed the voyage out and home, and discharged his duty well. That, on the day after the vessel returned here, he went ashore; and though he came back within the twenty-four hours of each day, yet he never did any work on board afterwards. On the 2d Octobr he quitted the vessel finally, and went to sea on another voyage, leaving a letter of attorney to receive his wages.

It appears that after he first left the schooner, the captain hired another cook in his room, who continued on board at a dollar per day, notwithstanding this man's regular appearance on board daily.

It is contended on the part of the owners that this leaving of the vessel without permission amounts to a forfeiture of all this man's wages; and the 5th clause of the act of congress "for the government and regulation of merchant seamen" has been relied upon to this effect. The articles also were produced to this point. I am to decide whether a total or partial forfeiture of wages has been incurred.

It is part of the law of all the maritime powers that if a seaman be absent from his ship forty-eight hours, without leave, he forfeits his wages. Congress has adopted this regulation; and the only new matter con-

1794. tained in our law upon this point is relative to the sort
 Wm. Heron of evidence by which such misbehaviour shall be
 Sohr. ^{v.} Peggy proved.

In order to fix the forfeiture, it was formerly necessary to make a protest before some notary or other officer, and that upon oath. The act of congress declares, that in such cases the officer having charge of the logbook, shall make an entry therein of the name of the offending seaman; and, if he return within forty-eight hours, he shall only forfeit three days' wages, for each day of absence. But if he absent himself for more than forty-eight hours, he shall forfeit the whole.

The mate, or officer having the logbook, is, by this act, vested with very extensive powers. He is not *sworn* to the faithful discharge of this duty, and, if a bad man, may materially injure every incautious mariner; and such is their general character. The act is highly penal in other respects, particularly as it authorizes commitment to jail for leaving the vessel without permission. I think, therefore, it should be construed strictly: it is favourable, indeed, to owners and shipping, but highly rigid as respects the seamen.

I will now recur to the evidence in this cause. We find by the logbook that this schooner arrived at our wharves on *Sunday* the 21st *September* at two o'clock in the afternoon. An entry is made that the cook went ashore that day without leave of any person on board. No other charge appears against him, nor any thing else respecting him; no mention is made of his ever returning on board. Yet the mate in his examination declared that he came on board the next day, and staid an hour and a half; that he was there in liquor; that he continued to come on board daily, and staid always about the same space of time. Not only is the logbook silent as to this, but we find almost daily mention that "all hands were on board lading salt." Nothing conclusive therefore, appears in the logbook. If at the end of forty-

forty-eight hours from the time he first absented himself it had been entered that he had not returned, a Wm. Heron forfeiture must have followed. As it is, we should rather ^Vinfer that he was included in the expression "all hands on board." We must, therefore, have recourse to other evidence.

The mate proves that another cook was hired in the actor's place, but does not know by whom. The captain is gone to sea, and we lose the benefit of his testimony.

Mr. *Wyatt's* evidence must be conclusive as far as it goes.

He says that a few days after the vessel arrived, he was on board, and the captain asked him if he had seen the cook. He answered, that the cook was on shore with a sore leg. The captain desired him to advise the cook to return on board, and save the money he had earned, as he was then paying a dollar a day to a substitute. He added some further advice as to this man and a large family who would suffer by his neglect of duty, as well as waste of money on shore. From this it would seem that neither the captain nor the actor entertained a thought of a total forfeiture at this time.

The 7th section of the act allows the master to have his seamen sent to jail for an offence of this sort; but he preferred hiring one in his room, out of regard both to him and his family.

Wyatt says the man acquiesced in the captain's hiring a person in his room; here, then, is a tacit agreement between them, under the impression of which the man seems to have gone to sea, leaving a power to receive his wages, subject to this deduction. Neither vessel, owner, nor captain was injured by the arrangement, and I see no *equitable* cause why he should forfeit what he had so well earned for twelve months preceding. As to the remedy under the act, it was waived by the defective entry in the logbook.

Nevertheless,

1794. Nevertheless, I think the conduct of this man blamable, ~~and~~ ^{Wⁿ. Heron} and that he ought to be mulcted agreeably to one part ~~of~~ ^{S^r. Peggy.} of the clause above cited. He was absent from the vessel fifteen days previous to the 7th October, when the vessel was discharged; he must therefore lose forty-five days wages, that is, a month and a half at ten dollars,

15

Hire of a substitute for fifteen days, at
one dollar per day,

15

Dollars 30

Let that sum, then, be deducted from what is due to him; and as the act declares that where one person is hired in the room of another, damages shall be recovered with costs, I decree further that the actor pay the costs of this suit.

October 24.

M^r Grath v. Sloop Candalero, and Henri Hervieux.

Restitution
of a vessel
and cargo,
illegally
seized and
carried into
a French
port, was de-
creed by the
admiralty
there.

This court
sustained a
suit for con-
sequential
damages.

THE claimant in this case has produced no evidence, nor attempted to controvert that of the actor. The latter has proved that he is a native and citizen of the *United States*, and sole owner of an American schooner called the *Polly*. That on the 5th day of *July* last this vessel cleared regularly from this port, with a cargo, bound to the island of *Providence*, having on board all necessary papers. That the cargo was wholly neutral, and so expressed in the clearance, which enumerated every article; and that there was nothing contraband on board. That the *Polly*, commanded by *Noah Wright*, and having the actor on board, passed the bar of *Charleston* on her intended voyage, in company with a private armed vessel of war called the *Narbonne*, fitted under the authority of the French republic, and

and commanded by the claimant. That they proceeded together to sea about nine leagues, and then, on the afternoon of the same day, the said privateer took possession of the *Polly*, took out the owner, captain and crew, except one man, and carried the vessel to *Port-de-Pair* in *St. Domingo*, as prize. That the clearance and other necessary documents were produced, but entirely disregarded.

1794.

M'Grath

v.

Sloop Canta-

lero.

Upon their arrival at *Port-de-Pair*, an examination took place in the office of admiralty, and a decree was passed ordering immediate restitution of the vessel and such parts of the cargo as belonged to M'Grath, and a sale of the rest, (which also belonged to American citizens) with a deposit of the money, until the owners should prove their right to the same.

It appears that before redelivery of the schooner to her owner she had been run ashore in a gale of wind, and received so much damage that she was sold for \$600 dollars; much less than her previous value. And, there being no market for the owners' part of the cargo, he left it in the hands of the captors, and brings this suit for compensation for the loss he has sustained:

1st. By being carried to a distant port instead of that to which he was bound, and where his cargo would have sold to great advantage.

2d. By the damage done to his vessel, which he was compelled to sell at a very low rate, for want of funds to repair her.

3d. By spoliation of all his cabin and other stores.

4th. By being taken out of his own vessel, and confined for sixteen days on board the privateer.

5th. By the derangement of his affairs, having been kept out of business since August last.

The claim for damages is founded on the law of nations, and on the 22d, 23d, 24th, 25th, and 27th articles of the treaty with France.

The

1794.

M'Grath
Sloop Canda-
lero.

The only justification set up by the claimant is 1st. His right, by virtue of his commission to board and search all vessels at sea.

2d. That an adjudication having taken place in the court of the power to whom the captor belonged, this court cannot inquire into the grounds of such decree, but must give full faith and credit to the same: and that if the party has been injured he must apply for relief to the executive power of these states.

The 27th article of the treaty with *France* regulates the mode of proceeding of their vessels of war and privateers, which, in the present instance was wholly disregarded. *Hervieux* first enticed this schooner to follow him to sea by an offer to pilot her over the bar, as she had no pilot on board. As soon as she had proceeded above a marine league from the coast she was pursued by the privateer, and two shots fired at her; the lieutenant then boarded her with five others, all *armed*, carried the captain and papers on board the privateer, and sent a prizemaster and crew on board the prize. *Hervieux*, on examining the papers, acknowledged their validity, but said that he would carry the vessel into a French port where provisions were wanted, rather than suffer her to proceed to an English one. This was done without the slightest pretext, and in wanton violation of the treaty; for even if she had had contraband goods on board, more than the captor could have received on board his vessel, the 13th article of that treaty provides that, this being the *nearest port*, the *Polly* should have been brought in here, where a proper and speedy remedy would have been afforded.

As to the right of this court to inquire into the adjudication that took place at *Port-de-Pair*, I am ready to declare that I should not do so with any view to *controvert* such adjudication; for the sentence of an admiralty court duly constituted must receive full credit in foreign countries. But I am called upon to *sup-
port*,

port that decree. The case from lord *Raymond*, 935. is 1794.
good law, and it is there said by lord *Holt* that the
sentence of a civil law court in a foreign realm should ^{M'Grath} Sloop _{v.} ^{Canda-}
be *executed* in England by a court of the same nature,
and proceeding according to the same law.

Had a suit for damages been dismissed at *Port-de-Paix*, it might have been a question whether this suit should be sustained. But as the illegality of the seizure was pronounced there, as the action is *transitory*, and the actor has chosen to seek for compensation in this court, I must say that his suit is properly brought. I think the libel relevant, and fully proved, and shall, therefore, proceed to inquire into the quantum of damages. The principles laid down in *Lecaux and Eden* (*Douglas* 575) apply here. Guided by them, and having fully inquired into the loss of time and property, and considered the imprisonment on board the privateer, I adjudge and decree that the claimant pay to the actor 1984 dollars, with costs of suit, and that the privateer remain under attachment till the same be paid.

Loss on vessel	- - -	200
Loss of stores,	- - -	274
Corn, worth at Providence,		510
Detention of captain and crew and consequent loss	- - -	1000
		<hr/>
	Dollars	1984

M'Grath

1794.

McGrath

Sloop Canda-
lera.

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District Court of Saint Domingo

port that decree. The case from *Lord Douglass* is good law, and it is there said by *Lord Douglass* that sentence of a civil law court in a foreign country may be executed in England by a court of the same country and proceeding according to the same law.

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Loss on vessel	200
Loss of stores,	274
Corn, worth at Providence,	510
Detention of captain and crew and consequences	100
	1984

Dollars 1984

MGrath

1794.
Nov. 10th.

Admiralty courts have jurisdiction to proceed by attachment *in rem*, for torts. Motion to review a decree must fail after writ of error lodged; and if the exceptions to the jurisdiction might have been taken before the decree passed. Otherwise, if error appear on the face of the record, or if new matter be discovered.

M'Grath v. Candalero.

ON a subsequent day a motion was made that the above decree might be reviewed, and the property attached in this cause to answer damages might be discharged.

Judge Bee:—Out of this motion two points arise for discussion.

1st. Whether this court has jurisdiction to proceed, by attachment, for torts.

2d. Whether, even if they have not, exceptions to the jurisdiction are not now too late.

By the 9th section of the judiciary act this court has exclusive original cognizance of all civil causes of admiralty, and maritime jurisdiction.

At common law, an action will lie for seizing, stopping or taking a ship upon the high sea. (*Le Cour et Eden.*)

Our state courts might, therefore, have exercised such jurisdiction; but the act of congress vests it *exclusively* in this court, in the first instance. If, then, the present motion succeeds, there would be a right without a remedy. It is not denied that attachment will lie in matters of debt or contract. Why not in cases of tort? If an alien sue here for a tort under the law of nations or a treaty of the *United States*, against a citizen of the *United States*, the suit will be sustained. Shall it be otherwise, where the alien is the offender, and one of our citizens the party complaining? The object of the attachment is to secure redress out of the property of the party, when you cannot get at his person. If he comes in time, and gives security, his property may be discharged.

In short, I can see no reason for granting what is sought by this motion, and many for refusing it. Even if it were a new question, I should think it one of the cases

cases in which a good judge would choose "amphare jurisdictionem."

1794.

M'Grath

v.
Candalere:

The second point is, whether after decree, and writ of error lodged, this application is not too late. I think it is. The parties themselves proposed to lodge this money as security, subject to the order of the court. At any rate it would have been liable, after the decree had passed. Even under the old practice of *stipulation*, body and goods were included. And if *Hervieux* were in custody on *capias* to fulfil the decree, he could have derived no benefit under the state law of insolvency, by which *torts* are excepted.

It is laid down in *Viner's Ab. tit. Chancery, Z. Ca.* 18, that "forgetfulness or negligence of parties is no foundation for a bill of review."

"Matters which might have been put in issue in the original cause, shall never be examined on bill of review.

"Bill of review is allowed only on errors apparent upon the face of the record, or on new matter discovered since the decree." *Gib. Eq. Rep.* 184.

I

Reid

1795.
January 22.

Reid v. Ship Vere.

French prisoners in their way to England, seized the ship in which they were, and brought her into this port. The court has not power to order restitution, either by the law of nations, or consistently with the treaty between the U. States and France.

ALL the facts in this case were admitted. The libel states that the ship *Vere*, belonging to British subjects, was employed by that government in conveying a number of French prisoners from *Jamaica* to *England*. Having, on the voyage, parted from the convoy, the prisoners took the command of the vessel from the captain, and carried her into the port of *Georgetown*, in this state, where she was run on shore. Part of her stores and other articles were landed, and are now under the care of the collector of that port. Restitution is required from this court, under the law of nations.

The French captors plead in bar that they had a right to make this capture, and rely not only upon the law of nations, but also upon the treaty between us and *France*. It was contended for the actor that the seizure was made without any commission; and that the vessel, having been brought into a neutral port, must be restored, though she might have been claimed by the sovereign power, if carried *infra praesidia* of *France*. To this point have been cited *Vat.* 3, 46. and *Mollov.* 9 and 10. But these authorities do not appear to me applicable here.

For the claimants it was insisted, that as there has been no breach of our neutrality, this court cannot interfere. That either party may, in a like situation, enter our ports, and that the treaty with *France* even permits this to the British, for a short time.

That the right of capture not being denied, an asylum must be granted to their captors, who are in transitu to the *praesidium* of their own country, and have a right to depart unmolested.

I have considered this case with attention. The law of

of nations upon the point is clearly expressed in *Vat.* 1795:
 S. 14. 208. And the 17th article of the treaty with Red
v.
France seems to have been grounded on the principle ~~sub vere.~~

there laid down; for it goes the full length of it.

By that article, even British captors thus circumstanced, would have been protected against any interference of this court, further than an injunction to withdraw from our harbours. Surely, then, the *treaty with France* cannot operate so as to put these *citizens of France* in a worse situation than their enemies. Upon the whole, I am of opinion, that the plea to the jurisdiction must be sustained. But I shall dismiss the libel without costs, as the actor might reasonably think himself bound to apply to this court in the first instance. Let each party pay his own costs and expenses.

Williamson v. Brig Betsy, and J. P. Sarjeant.

March 23

THE actor was master of this brig, belonging to British subjects. On the 23d of November 1794, she was captured on the high seas by the defendant, who commanded a privateer called the *Port-de-Paix*. The libel states that this privateer was armed and equipped for war, wholly or in part, in this port; and that *Sarjeant* is a citizen of the *United States*, or British subject; and, therefore, could not be legally commissioned, as a French citizen, to take prizes. That this brig having been brought into the neutral port where the armed vessel was unlawfully fitted out, ought to be restored to the original owners.

The plea to the jurisdiction sets forth that the privateer is owned by *Sarjeant* and *Olmstead*, both French citizens. That the crew are also French citizens, or, at least, shipped as such. That their vessel is a French

The privateer was illegally fitted out here, and commissioned by Genet. As such she was among those proscribed by the president of the United States, and was dismantled in North Carolina, and sold. She was afterwards fitted out for war in a French port, and by a French commission. This is no breach of neutrality.

1795. Williamson v. *Brig Betsey*. a French bottom, equipped at *Port-de-Paix*, and not in any port of the *United States*, and that she was duly commissioned by general *Laveaux* on the 23d *August* 1794. That she arrived here in *September*, and sailed in *November* following, with no additional equipment whatsoever. That no American citizen entered on board during her stay, though several British seamen did. The capture is admitted, far without the jurisdiction of the *United States*, and the 17th article of the treaty with *France* is relied on in support of the plea.

It appeared in evidence that this vessel was formerly American, that she fitted and armed in this port in 1793, and was commissioned by *Genet*. That she was in the number of those proscribed by the president of the *United States*; and that in consequence of such proscription, she was stripped and dismantled in *Wilmington* (N. C.) and lay there a considerable time in that condition. Her American register was given up, and the bond for the same cancelled at his office.

It appeared that, some time afterwards, this vessel arrived here from *North Carolina* with a clearance and manifest, as the *Dolphin*, and a bill of sale to one *Gibson*, of the island of *St. Bartholomew*. That she cleared and sailed from hence on 5th *August* last, as a foreign vessel, at which time, as well as on her arrival from *North Carolina*, she was unarmed, and in no manner equipped for war.

Upon this evidence I am of opinion, that although the original fitting out here as the *Vainqueur de la Bastille*, under *Genet's* commission, was contrary to neutrality, and all acts done by the vessel, illegal and within the jurisdiction of this court, yet that the subsequent dismantling, change of property, and cancelling of her register, occasion a total difference; and that her subsequent proceedings cannot be questioned here. Let the libel be dismissed with costs.

British

British Consul v. Ship Mermaid.

1795.
April 3d.

THIS is a cause of considerable importance, in the course of which various and contradictory testimony has been adduced. If this court had been vested with the final decision of the case, I should have rejected much of the evidence; but as both parties intimated an intention to appeal, I chose rather not to interrupt the proceedings.

The libel charges three grounds of restitution of the captured property.

1st. That the privateer *General Laveaux*, by which the *Mermaid* was taken, was an American vessel at the time of her sailing from this port.

2d. That she was fitted for war here.

3d. That the greatest part of the crew was shipped here, and consisted of citizens of the *United States*.

These charges are positively denied by the answer, on the oaths of *Sasportas* and *Gaillard*, two of the defendants, who are expressly interrogated in the libel to these points. And it was contended that in such case the oath of the defendant must be conclusive, unless contradicted by *two* witnesses, or by one witness with the corroboration of probable circumstances.

The law certainly gives little weight to a man's own oath in his own cause, if it be not supported by circumstances; and yet if there be but one witness to contradict the answer, the court will direct a trial at law to try the credibility of that witness. But where the answer is contradicted by two witnesses, they are sufficient to do it away. *Gibb. Law of Ev.* 133, 134. *1 Viner, 161. Pr. Chan.* 19. *3 Ch. Ca.* 123.

On the first point, or ownership of the privateer, no direct proof has been adduced against the answer; but a great

The 17th article of the treaty with France protects French privateers in bringing their prizes into our ports, (the such privateers may have originally been American bottoms) if the equipment for war be in a French port, and the commission regularly obtained by French citizens.

1795. a great variety of circumstantial and presumptive proof
 British Consul is offered, which has been commented on with much
 ship Mer.
 maid.

On the other hand, the answer is supported in this point by the evidence of the collector, who proves a change of property by his delivery up of the bond, and cancelling the register, in consequence of sale to a foreigner. This is *prima facie* legal evidence; for no vessel after this proceeding can become again American. The bill of sale is also good evidence to this point, unless set aside by direct proof, which is not produced. I am, therefore, of opinion that this brig, though formerly owned by an American citizen, was sold, and had changed her American character, before she left this port.

The second ground of the libel is, that she was fitted for war in *Charleston*.

From the evidence, as well as from the acknowledgment of the party, there cannot be a doubt that this vessel underwent a material alteration previously to the change of ownership. Her quarter deck was taken away, all decayed timbers and planks repaired, her ports opened, and other work done. By whom, then, at what time, and with what intent these alterations were made, and under what penalty, are all material questions, upon the determination of which the cause must turn.

It appears by the shipcarpenter's book that the repairs of this vessel were begun on the 14th *May*, that all the alterations to her hull were made prior to the 23d *June*, and that every thing was done by order of *Sasportas*, who alone is charged with the same in the shipcarpenter's books.

Whether the old ports only, and no new ones, were opened, is made doubtful by the contrariety of evidence; but upon careful investigation of it, it appears that the vessel, having been originally built for a privateer,

vateer, had ports fore and aft, most of which had been nailed up and caulked in. And though the seams might be discovered on the outside of the vessel, yet, in the inside, the lining concealed the old ports, and they could not be seen till that was ripped off. They of course, became visible, as soon as the quarter deck, cabin, and steerage were taken away; which, I have no hesitation in saying, might legally be done.

1795.

British Consul
V.
Ship Mer-
maid

The laws of neutrality and nations in no instance, that I know of, interdict neutral vessels from going to sea armed and fitted for defensive war. All American Indiamen are armed, and it is necessary they should be so.

But it appears from the pleadings, both answer and replication, that this vessel was put into the hands of the carpenters, that she might be prepared for a cruize, in case of war between the *United States* and *Great Britain*. When the wisdom of congress substituted an embargo for a declaration of hostilities, preparations of this sort might have been seen in every state of the union. No vessel could go to a foreign port, and they were, therefore, equipped for war at home, as their owners thought fit; nor will it be contended that this was illegal.

From the instructions and circular letter to the different collectors it was clear that the vessels of the belligerent powers alone were comprehended in the restrictions. Even they might arm for defence; and if, as respected French vessels, it should appear *doubtful* whether their equipment was applicable to war or commerce, such equipment was declared lawful. I have before had occasion to observe that though these instructions were not binding on the court, they were, nevertheless, entitled to attention as expressive of the wishes of the government founded upon the law of nations.

Having declared my opinion that the original fitting out

1795. out of this vessel was legal, I will consider the operation of the acts of congress of 22d *May* and 5th *June*,
 British Consul
 Ship Mer-
 maid.

While this vessel was American, and armed only for defence, the act of 5th *June* did not reach her; and the act of 22d *May*, passed to prohibit the exportation of warlike stores, excepts such articles as may constitute the equipment of any vessel, foreign or native. When the act of *June* was promulgated here, the repairs of this vessel were complete, and her ports open. After sale to *Ladevize*, she took on board guns; but then the collector interfered, ordered her guns to be landed, and her ports to be closed; which, according to the report of officers, sworn to the discharge of their duty, was done. She was searched from stem to stern, above and below, and no warlike instruments of any kind was found. What more could be done or required? Was the American owner to have his property laid up, and rendered useless, because he had been preparing for war at a time when it was not only lawful, but laudable?

An attempt was made to prove that she had guns in her hold when she passed the bar; but this rested upon hearsay evidence, not upon oath, and merits no attention; especially when opposed to the oaths of *two* of the defendants.

The third ground of the libel is that the crew, or the greater part of it, consisted of citizens of the *United States*, shipped in this port. The oaths of the defendants deny this. They swear that she had on board twenty three Frenchmen, including four officers, together with seventeen French soldiers and five officers belonging to French regiments at *Port-de-Paix*; and *no other persons*.

The pilot, who carried her over the bar, says her crew consisted of about forty, all *outlandish*, and only one able to speak English.

The

The captain of the prize gives a similar testimony. 1795.

No proof being adduced to support this part of the British consul libel it must be wholly laid aside.

Ship Mermaid.

As it is clear from all the circumstances that this privateer has not infringed any neutral right of the *United States*, she is protected by the 17th article of our treaty with *France*, in conformity to which her commission has been exhibited, and appears regular and legal. The prize was taken far beyond our jurisdictional limits; and I feel no difficulty in decreeing that the libel be dismissed with costs.

British Consul v Schooner Nancy et al.

April.

THE schooner *Nancy*, belonging to British subjects, was captured on the 12th January 1795, by the schooner *Fonspertius*, *Brown*, commander.

On plea to the jurisdiction, it appeared that the *Fonspertius* arrived here from *Jacquemel* in *St. Domingo* with a cargo of coffee in bulk, which was regularly entered at the customhouse. She was then fitted as a privateer, but not armed, and had only eight or ten men on board. Some alterations were made to her in this port, but there was a contrariety in the evidence as to their applicability to purposes of war. Some time after her arrival in port, the collector was asked for his permission to arm, which was, of course, refused, and additional vigilance excited. When she was upon the point of sailing, the French consul applied by letter to the governor for leave that she might depart as a *commissioned vessel*. It was proved that she had increased her force of men from eight or ten to more than thirty, among whom were some American citizens. She sailed from hence on the 7th of October,

An augmentation of force in our ports is a breach of neutrality, and of the law of nations, and of the United States; and will occasion a restitution of the prize if brought within our jurisdiction.

1795. chased the *Nancy* on the 9th, and captured her on the British consul 10th, at the distance of nearly 100 leagues from the bar Schr. *Nancy*. of *Charleston*; at which time she had both cannon and swivels mounted. As she was unarmed when she came in here with her cargo, there was the most violent presumption that these guns were taken in here.

The court was of opinion that this was such an augmentation of force in our ports as amounted to a breach of our neutrality and of the law of nations, and to a violation of the act of congress of June 1794; and restitution of the prize and her cargo was decreed accordingly.

Sept. 29.

Bolchos v. three Negro Slaves, and Edward Darrel.

Neutral property in an enemy's ship is forfeited by the 14th article of the treaty between the U. States and France. If mortgaged property is

left in the possession of the mortgagor who puts it on board the vessel of a belligerent, it is subject to capture, and the mortgagee is without remedy.

CAPTAIN *Bolchos* captured and brought into this port a Spanish prize; on board of which were these slaves, formerly mortgaged to *Savage*, whose agent, *Darrel*, by virtue of *Savage*'s mortgage, seized them and sold them. The facts have been admitted, and I am called upon to pronounce on the law arising therefrom.

I was at first doubtful whether this court had jurisdiction, *Darrel*'s seizure, under the mortgage, having been made on land. But as the original cause arose at sea, every thing dependent on it is triable in the admiralty. *Cro. El.* 685. *Yelverton*, 135. *Le Croix* and *Eden*, and other cases are full to this effect. If, indeed, I should refuse to take cognizance of the cause, there would be a failure of justice, for the court of common law of the state has already dismissed the cause as belonging to my jurisdiction in the admiralty.

Besides, as the 9th section of the judiciary act of congress gives this court concurrent jurisdiction with the

the state courts and circuit court of the *United States* 1795.
where an *alien* sues for a *tort*, in violation of the law of
nations, or a treaty of the *United States*, I dismiss all
doubt upon this point.

Bolchos
v.
E. Darrel.

Bolchos demands restitution of these negroes, by
virtue of the 14th article of our treaty with *France*.

The claimant contends that the negroes are not
within that clause, as they were not laden on board the
prize by the real owner, the mortgagee. And that no
unauthorized act of the mortgagor ought to affect an
innocent third person. As to this point, it is true that
a mortgage vests a right in the mortgagee under cer-
tain conditions, and for certain purposes. Yet, while
the property continues in possession of the mortgagor,
he may exercise the rights of an owner, may maintain
trespass or trover for it, or, as in the present case, may
hire it to others. But the question of property is here
of little consequence; for the mortgagor is a Spanish
subject, and the mortgagee a subject of *Great Britain*.

It is certain that the law of nations would adjudge
neutral property, thus circumstanced, to be restored
to its neutral owner; but the 14th article of the treaty
with *France* alters that law, by stipulating that the
property of *friends* found on board the vessels of an
enemy shall be forfeited.

Let these negroes, or the money arising from the
sale, be delivered to the libellant. But as there was
colourable ground for the defendant's seizing them on
behalf of his principal the mortgagee, let the costs be
paid by each party for himself, and the expenses of the
suit be divided.

Benjamin

1795.

March.

Equipment
for war in a
neutral port
does not take
place merely
by alteration
of two ports
in repairing
the waist of
a vessel pre-
viously arm-
ed.

Benjamin Moodie v. The Ship Brothers.

THE cause now before the court is briefly this. The schooner *Port-de-Paix*, duly commissioned by general *Laveaux*, and owned altogether by Frenchmen, captured on the 27th of *January* last (1795) on the high seas, without the jurisdictional limits of the *United States*, the ship *Brothers*, belonging to a subject of his Britannic majesty. The prize, upon her arrival in this port, was, with her cargo, libelled by the British consul, Mr. *Moodie*; who, among other causes, alleges that the privateer was originally fitted out in the port of *Charleston*, or augmented in her warlike force, contrary to the act of congress and law of neutrality and nations. He, therefore, claims restitution of the captured vessel.

The claimants on oath deny that the privateer was originally fitted, armed, or manned within any of the ports of the *United States*; or that she received therein any augmentation or addition, solely applicable to purposes of war. They produce a copy of their commission from general *Laveaux*, and plead the 17th article of the treaty with *France* in bar to the interference of this court in this cause. Several exhibits have been filed to shew that the captured vessel and cargo are British property; and one exhibit proves that the privateer was formerly an armed vessel in the service of the king of *Spain*, and then mounted eighteen guns.

—That she was captured by the *Montagne* French privateer and brought as prize into this port, from whence she afterwards departed with fewer guns than she had on her coming in. After which she was commissioned and manned at *Port-de-Paix*.

It was agreed between the parties, the pleadings being completed, that the evidence taken by me in this court

court in November last, in the case of the ship *Courier*, captured by the same privateer and libelled here, should be received as evidence in this cause also.

1795.
Moodie
v.
Shipbrokers

I have already, by my decree in the case of the *Courier*, declared my opinion of this privateer; but have reconsidered the evidence with great care. Messrs. *Wallace, Libby, Williams, Carpenter, Weyman*, and the collector, all agree that she was a complete privateer when she first arrived here. She had then fourteen guns on her main deck, two cohorns forward, and swivels on her quarter deck. They also agree that she received no augmentation of force here.

She had been much injured in her engagement with *La Montagne*, and was compelled to take off her quarter deck. She then went to sea, returned dismasted, and took a new mast. But none of the witnesses saw any additional equipments. *Ingram*, who worked on her says, she had her quarter deck taken down, her waist repaired, and *two ports cut therein*.

That she was an armed vessel when she arrived, and was repaired as a privateer.

The question then is wholly as to the cutting of two new ports, when her waist was repaired. This arises out of *Ingram's* testimony, which is at variance with that of *Williams, Libby, and Carpenter*, and positively contradicted by the oath of the claimants, who swear that the repairs she received in this port were necessary to her safety and sailing, but not at all applicable to war.

They say that she actually went to sea with fewer guns than she had when she arrived as prize.

Admitting then, for the sake of reconciling *Ingram's* testimony with that of all the other witnesses, and with this oath of the claimants, that two of her ports in the waist were *altered*, this will not amount to any *additional* equipments; nor can it be considered as a breach of neutrality. If a prosecution had been instituted under

1795.. der the act of the 5th of June, no forfeiture could have been adjudged for so trifling an alteration.

Moodie v. Ship Brothers. Upon the whole, I retain my former opinion, and that upon mature deliberation. I therefore admit the relevancy of the plea in bar, and decree that the libel be dismissed with costs.

1796.
January 9.

Supplies to a foreign vessel in a neutral port will constitute a lien on the vessel, and are recoverable in a court of admiralty.

North & Vesey v. Brig Eagle and Cæsar Peronne.

THIS is a suit instituted against both vessel and captain to recover the amount of sundry necessary articles of shipchandlery, supplied by the actors for the use of this brig, at the request of the captain.

It is contended, on the part of the majority of the owners, that the vessel should not be liable, because, at the time they purchased their shares, the captain engaged to pay all outfits and expenses. They allege also that the captain drew an order on *Lefèvre*, one of the owners, for the amount of *North* and *Vesey*'s account, who, thereupon, gave a receipt for the same, and so effectually released the vessel from any lien they might otherwise have had. It appears, however, that the receipt given by the actors was conditional, viz. that when the order should be paid, this receipt should be in full.

This is a very clear case. The law, as laid down in *Cowper*, 639. is indisputable: that whoever supplies a vessel with necessaries has a treble security, the person of the master, the vessel itself, and the owners thereof, whether the supplies be furnished with their knowledge, or not.

Although all the owners in this instance are here, yet this is the case of a foreign vessel in a neutral port, and the law applies accordingly. The captain might have

have hypothecated the vessel by deed, for payment of this demand; and the owners would have been without remedy. The actors and the captain agree that the supplies were furnished on the credit of the vessel. The lien had attached, and the conditional receipt did not at all impair it.

1796.

North and
Vesey
v.
Brig Eagle.

This case differs materially from those where contracts are made between owners of a vessel with carpenters and others to perform a service on land, or within the body of a county; in these instances, the admiralty has no jurisdiction. Here *Peronne*, the captain was a stranger, and none of the other owners appeared, till the supplies were furnished. Indeed, by their account the captain had engaged to furnish them. The actors would not have furnished these articles upon any other than the security of the vessel. It is true that they might have proceeded against the owners or captain at common law; but they have chosen rather to impound the vessel in this court; and I am clearly of opinion that their libel must be sustained, and their demand be paid out of the proceeds of the brig, which has been sold, *pendente lite*, by consent. They must also have their costs of suit.

Coleman

1796.
July 25.

Coleman et al. v. Brig Harriet

Double wages are due by the act of congress in cases of failure of provisions, if the ship sail without the quantity specified in the act.

THE libel in this case consists of two counts or allegations.

1st. For wages agreeably to the articles, the voyage being ended.

2d. For double wages for ninety days, as provided by the act of congress; the men having been at short allowance of provisions during that time.

The captain's answer admits that the contract was fulfilled on the part of the seamen, with the exception of one, whom he charges with embezzlement.

The answer further states that the quantity of beef on board was nearly double of what the act requires; that there was one third more than the requisite proportion of water per man: but that he was obliged to put to sea with ninety pounds of bread, instead of one hundred pounds, per man, because he could procure no more at the port from whence he sailed.

That the voyage was unusually long, the vessel having been dismasted in a gale of wind; without which there would have been no such failure of bread. The logbook shews that they procured some supplies from other vessels at sea.

It was proved that the allowance of bread was diminished the day after they lost the mast.

It is admitted that all the seamen are entitled to the usual wages, except one. With respect to him, the embezzlement of several articles was fully proved. The value of these must be deducted from what shall appear to be due to him. The others will be paid of course.

The only difficulty arises out of the claim for *double* wages.

The oath of the master in his answer not being contradicted

tradicted, it must be received as evidence so far as it 1796.
goes. It proves clearly that the diminution of allowance. Coleman et al.
v.
Brig Harriet. extended only to the single article of bread. There was a great overplus of meat and water. The loss of the mast was an accident that could not reflect blame on the captain; but it occasioned their being at sea one hundred and thirty five days, instead of sixty six, and caused a failure of bread, in which article they were at short allowance from the 15th *September* to the 24th of *December* following.

The act of congress having, avowedly, not been complied with, I am obliged to decree that the seamen receive *one third* of the amount of the wages contracted for in the articles, over and above their common wages. This I consider as a sufficient compensation for the deficiency in *one* article of provisions.

Let the costs of suit be paid by the captain.

L

Wilkie,

1796.
July.

*Wilkie & al. v. 205 boxes of sugar, &c. saved from
the Brig St. Petre at sea.*

No length of time shall divest the original owner of property found derelict at sea. It will be restored upon payment of salvage according to circumstances; unless there be proof of an intention to abandon wholly.

THE libel is filed against sundry articles claimed as derelict. The vessel out of which they were taken, was found on the high seas, without any living creature on board; and is supposed to be Spanish.

A claim is exhibited by the Spanish consul on behalf of the owners or insurers of a Spanish vessel called the *St. Petre*, belonging to subjects of the king of Spain. It is stated that the said brig, having encountered a violent storm at sea, was so much damaged as to compel the master and crew to abandon her. That they accordingly quitted her, and were received on board of an American vessel belonging to *Philadelphia*, where they arrived in safety.

The claim further states that the said brig afterwards drifted near the shore of *North Carolina*, and was carried into some port of that state; where the rest of the cargo was safely landed.

In arguing the cause, it was strongly contended for the actors that this vessel had been so completely abandoned at sea as to become the property of the first subsequent finder. It was said that the owner of property might so cast it away as to relinquish his right; and that such was the case here. But, to constitute such a relinquishment, it must be shewn to be voluntary, and not caused by circumstances which the first owner could not control. If a case of this sort ever happened, the present is not like it. There is not a shadow of reason for supposing that this vessel was abandoned voluntarily. When the articles now libelled for were taken out, the vessel was a mere wreck: she had evidently been exposed to some dreadful tempest. If it were proved that she had been long in this condition, it would give no better right than would have accrued

crued on the day subsequent to the abandonment of 1796.
her.

Wilkie et al.

Cases were cited to shew the difference in regulating ^{Brig St. Petre.} wreck and derelict, from the times of the Rhodians to the present. The laws of *Rhodes* did, indeed, give all wrecked property, cast on shore, to the lord of the soil, even though the owners were saved. But the Roman law was directly opposed to this; and the laws of *Oleron* make a distinction between wrecks where all on board had perished, and those where some living creature had reached land; probably because, in the latter case, the original owner might be discovered. But if this was thought necessary formerly, it can hardly apply to modern times, when the marks of property are so much more numerous and clear.

Molloj says that there is as it were a contract between those who are wrecked and those on land where the goods are cast, that the same shall be restored. And lord *Mansfield* in the case quoted from *5 Bur. 2738.* asserts that there never was a determination in the courts so contrary to the principles of law, justice, and humanity as the one now contended for.

The same may be said of all the old cases from *Molloj*, *Bracton*, *Briton*, *Postlethwaite*, *Domat*, and others, respecting derelicts at sea. Why should the owners of property suffer more on one element than on the other? Formerly, indeed, the probability of its being saved at sea was comparatively small, because fewer vessels then navigated the ocean. But at this day, when it is covered with the ships of different nations, the chances of being met with are a thousand-fold greater, and the doctrine no longer should be maintained. *Vattel* calls it "the unhappy fruit of barbarism, which almost every where disappeared with it." *Vat. I. 23, 293.* The case cited from *Beawes' Lex Mercat.* 147, is in point. The vessel there was abandoned at sea by the master and crew; yet the court of admiralty

1796. admiralty of *Dunkirk* gave salvage, and restored the *wikie et al.* rest. In that case, as in the present, the abandonment *Brig St.Pete.* was, perhaps, premature. That vessel did *not* go to pieces; and this brig drifted to the coast of *North Carolina*: for I have no doubt that she is the same that the Spanish consul describes. This is clear to me from a comparison of the protest of captain *Basset*, who carried the crew to *Philadelphia*, with that of captain *Wilkie*, who met with the brig after she was abandoned. The former says that she was a brig, called the *San Piero*; that she was abandoned on the 4th *August*; that she appeared to him to be in a most dismal situation, her masts gone, and her rudder *almost* gone; that it was so broken as to be unfit for use, and incapable of repair; that the vessel leaked much, and that, in his opinion, the crew would have risked their lives by remaining longer on board.

Wilkie says that he met with the vessel on the 19th of *August*; that she appeared to be either a ship or a brig; that she seemed to have lost her masts, though, when he boarded her, he found her mainmast and bowsprit standing. The head of the rudder down to the water's edge was broken off, and she had four feet water in her hold. In passing her stern he saw some letters, under the cabin windows, nearly effaced; but he supposed them to mean *St. Peter*.

These different names of the same saint might, in so obliterated a state, appear a little different to these two captains.

Some of the exhibits state that the brig *San Pedro* drifted on the shore of *North Carolina* some time in the same month of *August*. She had been derelict fifteen days when *Wilkie* found her. He towed her till the 22d, and then the hawser broke, and she parted in the night, at such a distance from the spot to which she drifted as might well be passed in the nine remaining days of *August*.

From

From a view of all these circumstances, I am satisfied that this is the same vessel, and upon a comparison of this case with that of the *Priscilla*, decided by ^{Wilkie et al v.} _{Brig St. Petre.} me three years ago, I see no reason to vary from the principle established on that occasion. If I am wrong, an appeal to a higher tribunal will put at rest all difference of opinion upon a point of so much importance to the interests of commerce.

I adjudge and decree that the proceeds of the sale of the articles mentioned in the libel, after deducting the usual charges, be divided equally between the actors and the former owners, if they shall duly authenticate their property within twelve months from this day. If not, let one moiety remain deposited in the branch bank of this city to await the further order of the court. As there is a possibility that this may be finally adjudged to persons *not* subjects of the king of Spain, I dismiss the claim of the Spanish consul; but without costs.

Trump

1796.

Septemb. 3.

~~The vessel was sold under sentence admiralty, of the court of admiralty sold at public sale under that decree, and purchased by others of the crew at Providence at the suit of a third person for a valuable consideration. These facts are stated and charged in the libel.~~

~~These libellants had notice of the proceeding, but did not apply for their wages. Their lien on the vessel at an end.~~

~~On the other side it is insisted that by the maritime law, and usage of courts of admiralty, the lien of these men on the vessel is totally at an end.~~

I have considered this case with great attention, and find that the proceedings of the admiralty court at *Providence* were in the usual mode. The libellants were on the spot, and might, on the return of the monition have been made parties to the suit. Nay, even after the decree, and previously to the sale, I think the court, upon hearing their case stated, would have let in their demand.

But it does not appear that they took a single step in the business, though there is proof before the court that they might have done so. They are therefore, strictly within the rule of law, "*vigilantibus non dormientibus subveniunt leges.*"

The sentence of a court of admiralty is notice to all the world. The court at *Providence* had competent jurisdiction; this sale was made openly and without any pretence of collusion; and I am of opinion, that the present claim against the *vessel* cannot be sustained. If it could, no purchaser would be safe.

I dismiss the libel, but without costs.

George

George Babbel v. Job Gardner and Brig Catherine.

1796.

THIS is a suit for wages as chief mate of the brig *Catherine*.

The vessel is British property, the articles were signed in *London*, and, therefore, the contract must be considered altogether according to the *lex loci* of the country where it was made. The argument has been full, and the evidence long, and, in some points, contradictory; but upon mature consideration, the two following points seem alone to call for my decision.

1st. Whether there has been such a breach of his contract on the part of the actor as amounts to a forfeiture of his wages.

2d. Whether he is entitled at this time to demand them.

It appears that the actor did his duty on board this vessel for upwards of eleven months; and no complaint is produced, prior to the dispute which occasioned this suit. The words made use of by the captain, in the heat of passion, might, if there had been no subsequent explanation, have implied a discharge; but the conduct of the captain next morning was fully sufficient to do away that impression: for he desired the mate, coolly, to go on board and do his duty; and upon hearing something about being discharged, asked who had discharged him.

But was this retraction on the captain's part so far binding on the mate as to make the latter guilty of desertion?

That he considered himself as discharged is certain. That upon his own statement of the circumstances, counsel concurred with him, is also clear. Let us then look into the act of 2 *George 2.* to which the articles expressly refer. The 3d clause says that desertion, or obstinate

A British
seaman does
not forfeit
his wages,
under the
act 2 *George*
2. merely by
coming on
shore to de-
mand legally
payment of
his wages;
but this
must be
done within
forty eight
hours after
he leaves his
ship.

1796. *Babbel v. Gardner.* obstinate refusal to proceed on the voyage shall incur the forfeiture of wages. No such obstinacy has been pretended here.

The act further declares that entering on board a ship of war shall not amount to desertion; and that no mariner shall, by signing articles, be deprived of the means of recovering wages due before that act passed.

In their construction of this clause, the courts of admiralty in this country, prior to the revolution, considered no seaman as a deserter because he entered on board of a ship of war, or because he applied to a court of justice for his wages, within forty eight hours after leaving his ship. Numberless instances of this sort may be found among the records of this court; and I remember the remarkable case of *Pitkin* and *Cardon* where this point was fully discussed. Indeed, if the *letter* of the articles be alone referred to, "that no man, "under any pretence whatever should go ashore without leave of his captain," redress must, in most cases, be withheld from the injured seaman; for, having once had recourse to the law, he would hardly venture back to his ship, till his suit should be determined.

I am of opinion that the actor having applied for legal satisfaction within forty eight hours after he left the vessel, cannot be considered a deserter, nor chargeable with a breach of articles.

But I am also satisfied that the hasty language of the captain does not amount to a discharge, if coupled with subsequent circumstances. The articles must be complied with, and the voyage therein described must be performed. Till then the mate cannot demand his wages.

Let the summons be dismissed.

Benjamin Moodie, British Consul, v. Ship Amity, and Isaac Hammond.

1796.

THIS case is one of a new impression. The libel admits the capture of the *Amity* on the high seas, by a vessel under the flag of the French republic. There is no allegation that this vessel has been fitted, or her force increased within the *United States*, contrary to the laws of neutrality. It is not alleged that the prize was captured within the jurisdictional limits of the *United States*. Upon these grounds alone has this court assumed jurisdiction, in cases of capture by French privateers, where the prizes have been brought ^{Sale on land in the ports of the United States cannot be prevented by their courts of admiralty, in cases of lawful capture on the high seas, by French privateers duly commissioned.} *infra praesidia* of this country. In all other cases the 17th article of the treaty with France is conclusive upon the subject of their prizes brought into our ports; and the point has been fully settled by several appeals to the supreme court of this country.

The only allegation in the libel, on which to found a claim for the interference of the court, is a sale of the prize on land, as being contrary to the 24th article of the treaty with *Great Britain*.

In support of this it is contended that by the 9th section of the judiciary act, this court has jurisdiction in all cases arising on the high seas, of admiralty and maritime jurisdiction.

That the original capture having been on the high seas, the court has cognizance of the original question, and, therefore, of all its consequences; of which this intended sale is one.

That the third article of the constitution of the *United States* extends the judicial power to all cases arising under treaties made, or to be made.

This court has cognizance of all such points of admiralty and maritime nature, provided they may be judged of by *any* court of the *United States*. But the

1796. treaty with *France* excludes all jurisdiction on our British Consul part, in cases like the present. The commission under ship Amity, which this prize was made, has been exhibited in court, as that treaty provides. It is unobjectionable; and the two grounds before mentioned have not, nor can be, taken. I have, therefore, no authority over the original question in this cause, and none over any of its consequences. As to the cases from *Douglas*, 582; 583. they do not apply here.

I am clearly of opinion that this court has no jurisdiction in this instance; and I dismiss the libel with costs.

1798.
March.

Compensa-
tion granted
for keeping
company
with the dis-
tressed ves-
sel, at the
earnest re-
quest of her
captain..

FROM the pleadings and evidence it appeared that the *Canada*, *Sewall*, master, on a voyage from *Jamaica* to *England*, having lost her rudder, and sprung her foremast in a storm, was obliged to bear away for the first port. She came to anchor off the bar of *Charleston*; when the captain came ashore for assistance, and returned with a new rudder, six fresh hands, and a pilot. The ship, in another storm, parted her cables, and was driven out to sea.

After several days she fell in with *Allen's* brig, bound from *New York* to *Charleston*, and intreated *Allen* to stay by the ship, and assist, if necessary, in conducting her back to the bar. With this he readily complied; kept company all day, and carried a light through the night. The next day they made the lighthouse; and, the wind being more moderate, the brig towed the ship towards the bar for two or three hours; after which the ship anchored, and the brig came up to *Charleston*.

The

The ship arrived, without further assistance, on the 1798.
following day; and the present suit is brought for com. ^{Allen et al.} ~~Ship Canada.~~
pensation. *Salvage* was claimed in the libel, but that ~~Ship Canada.~~
ground was abandoned.

Though the captain of the ship had expressed great solicitude to have the brig in company, yet the pilot and others from *Charleston*, who went to her assistance, concur in saying that the ship was in no immediate danger. She carried sail, notwithstanding the injury done to the foremast, and was manageable, notwithstanding the loss of her rudder. Though leaky, she was cleared of water by pumping half an hour in every hour, and that with a single pump: the cargo was not at all damaged. The crew of the ship, however, acknowledge that they derived much comfort from the presence of the brig, as they could rely upon her aid in case of greater danger.

The two vessels were together a day and half; but the brig never went out of her course, nor did she receive the least damage. Three hundred dollars had been offered by way of compensation, but refused. The judge decreed four hundred, and ordered the defendant to pay costs of suit.

Booth

1798.
March.

Booth et al. v. Schooner L'Esperanza.

Vessels in distress, met with at sea, and brought up, to those who were in possession of her when she was met with.

THE actors, in this case, owners and mariners of the American schooner *Ranger*, libel for salvage, to the crew, and a negro slave on board. The facts on which they ground their claim, power, must be restored, after payment of salvage, to those who were in possession of her when she was met with.

the American schooner *Ranger*, libel for salvage, *L'Esperanza*, her crew, and a negro slave on board. The facts on which they ground their claim, and which arise out of the evidence and pleadings, are, that on the 28th of February last, in latitude 27, 36, between the little bank of Bahama, and the Florida shore, the crew of the *Ranger* discovered *L'Esperanza* making a signal of distress. That, suspecting her to be a privateer, they kept on their course; but, perceiving that a boat from the *Esperanza* with only two hands on board was following them, hove to. When the boat came up, there were in her a Spanish boy, and a negro called *Williamson*, who said that the *Esperanza* had been captured, sixteen days before, off the Moro castle, by the *Charlotte*, a privateer belonging to New Providence, who put this boy and two negroes into the prize, and ordered her to that port. That they were driven into the gulf stream by a gale of wind, had been drifting about for sixteen days, not knowing where they were; and had neither provisions, water, compass, nor chart. Captain *Booth* supplied them with all these, and they then returned to their vessel.

But the Spanish boy and negro *Williamson* came back, and requested they might remain on board the *Ranger*; saying that the other negro, who was a slave, refused to quit the vessel, or give her up. *Booth*, however, was apprehensive of some risque; sent them back to their vessel, and made sail to proceed on his voyage.

Finding they still followed him, he again lay to, and let them come up, when they all consented to abandon

don the vessel to *Booth*. He accordingly sent his mate, *Cooke*, to take charge of her, together with the Spanish boy, and the negro slave; and kept the other negro on board of the *Ranger*, in lieu of his mate. *Cooke* navigated her safely into this port; and now they demand a liberal salvage for their trouble and care.

1798.
Booth et al.
v.
Schooner
L'Esperanza.

The British consul has filed a claim on behalf of the captors; the consul of *Spain* claims on behalf of the original owners. A third claim is interposed by *Cooke*, the mate, who navigated this vessel into this port; and who demands salvage to himself, on account of the risque he ran, and the fatigue he underwent: alleging that the safe arrival of the vessel was solely owing to him.

Both the consuls admit that salvage is due.

Restitution is contended for to the *captors*, on the ground of possession, (by virtue of the capture, and of the laws of war) at the time the *Ranger* met with their prize. The Spanish consul claims, because the vessel was in possession of a Spanish subject, as commander thereof, at the time the libellants found her at sea. It is insisted that no other *white* person was on board; that the two negroes were under his orders; and that they were endeavouring to make the best of their way to the *Havanna*; that she is still Spanish property, in possession of Spanish subjects. In discussing this question, the first point to be considered is, in whose possession was the *Esperanza* found by the *Ranger*; the last possessor being the only one whom neutral powers can notice. Great stress has been laid by the counsel for the Spanish consul, on the doctrine laid down in *Molloy* and other writers, that, before condemnation, there can be no change of captured property. But this doctrine is clearly set aside by the case of the *Mary Ford*, decided in the supreme court of the *United States*. 3 *Dallas's Rep.*

1798. 188. That vessel had been captured from British subjects, and remained some time (above twenty-four hours) *in possession* of the French captors, who, for want of hands to man her, endeavoured to set her on fire without success, and, finally, abandoned her. In that situation she was found at sea by an American vessel, and carried into *Boston*. She was libelled in the district court for salvage; and, subject to this, restitution was claimed by the French and British consuls, on behalf of the French captors, and original owners, respectively.

The district court decreed one third for salvage; and ordered restitution of the remainder to the owners. But this decree was reversed by the circuit court, and afterwards by the supreme court, who said that, “immediately on the capture, the captors acquired such a right as no neutral nation could impugn, or destroy.” I must consider this decision as my guide in every similar case; and I readily assent to it, more especially as the question of prize, or not, is thereby evaded.

But it is said that putting the Spanish boy on board, though as prizemaster under the British, alters the question: for that as he was still a Spanish subject, and has, on oath, declared an intention to carry the vessel into a Spanish port, he must be considered as holding her for the Spanish owners. The two negroes, on the contrary, maintain that they held her for the captors. But it is said that, as slaves, they were incapable of possession for any purpose whatsoever. This doctrine, however, goes too far; 1st. Because by the laws of this state, a slave authorized by his master to do an act, which a slave could not otherwise do, is *justified*, provided the master avows the order. 2dly. Because, as most of our coasters are navigated by slaves, and frequently commanded by a slave, the owners would be continually exposed to loss of their property, in case

case a vessel should be blown to sea, as is often the case. 1798.
Booth et al.
v.
Schooner
L'Esperanza.

There can be no doubt, however, that slaves in such a circumstance would be allowed to represent their owners, and to prove their property.

It was determined in this court on solemn argument, in the case of *Stone v. Godet*, that the owner of a slave could maintain a suit for his wages as mariner on board a coaster. The general policy of the country as to slaves must, therefore, admit of exceptions in particular cases.

It will now be necessary to inquire whether any and what circumstances took place on board the *Esperanza*, amounting to a recapture, or divestment of the British right. Admitting the boy *Pelaiz* to be a Spanish subject, yet he was found on board acting under British authority. The copy of the commission had not, indeed, been filled up; but at the bottom of it is a memorandum to shew that he was prizemaster of the *Esperanza*, a prize to the *Charlotte* privateer of *New Providence*, and consigned to *Edward Sherman* of *Nassau*. Under this authority he acted on board, under this he claimed to be commander, and, as such reported himself and vessel to the captain of the *Ranger*, when he first went on board. No expression or hint ever escaped him as being in possession for the Spanish owners, or as being a Spanish subject, till after his arrival in *Charleston*. Every thing on his part impressed the crew of the *Ranger* with the conviction that the *Esperanza* was a prize, bound to *Providence*.

But *Pelaiz* says in his evidence that he always meant to carry the vessel into a Spanish port, if possible; and that he had no other object in view when he went on board. Yet, in the next breath, he acknowledges that he looked on himself as master, *after the first day*; the negro being then in command.

Under the peculiar circumstances of this case, no evidence

1798. evidence of the negroes being admissible in this court,
 Booth et al. we must search for the real fact by comparing the
 v.
 Schooner former conduct of this boy with his present declara-
 L'Esperanza. tions.

When first he went on board the *Ranger* he called himself prizemaster of this vessel, and said she was bound to *Providence*. But it is said he was compelled to do so, lest the negroes should discover his intentions. If this was the case, he had not such a command on board as enabled him to go where he pleased, contrary to the consent of the owners. And this is further evinced by the conduct of the old negro, who, after *Pelaiz* and the other had offered to give up the vessel to the *Ranger*, still refused to go anywhere but to *Providence*. *Pelaiz*, in fact, relinquished his command to the black man, who, by his own account, held her for the British.

As to concealment of his intentions, it was, at any rate, unnecessary; for the mate proves, and *Pelaiz* confirms it, that when, in his conversation on board the *Ranger*, he called the vessel a prize to the British, the negro *Williamson* was in a different part of the vessel, and could not hear what was said. Captain *Booth* says that their course was for *Providence* when he met them.

I shall, therefore, set aside the evidence of this boy, as insufficient to destroy the right of the British captors; and shall dismiss the claim of the Spanish consul: but without costs, as he acts merely in a public capacity.

It is agreed that salvage is due, and it remains only to fix the quantum.

The *Esperanza* was in distress for want of provisions and water, but was staunch, and seaworthy, and cannot be in any manner considered as a wreck. By changing one seaman for another, she made land in four days.

On

On the other hand, she owed much to the *Ranger*, 1798.
 for necessary supplies, and the persons on board were Booth et al.
 relieved from great fatigue, and great possible danger. L'Esperanza.
 Much of this, however, would have been effected by
 being merely furnished with necessities, and with
 compass and chart. These would, probably, have ena-
 bled the three persons on board to reach a port; so
 that I cannot consider her as an abandoned vessel.

Nevertheless, I think great credit is due to captain
 Booth and his crew for the services they rendered; and
 I decree that they receive one fourth of the vessel and
 cargo as salvage. Let the mate, under the circum-
 stances of this case, receive a share equal to that of the
 captain of the *Ranger*.

Coulter v. the Cargo of the *Esperanza*.1799.
March 10.

AFTER sale under the preceding decree, but be-
 fore the marshal had paid over the money, the pre-
 sent claimant Joseph Coulter interposed a petition, stat-
 ing that he was an American citizen of Philadelphia, and
 sole owner of the cargo of the *Esperanza*, the same
 having been purchased at an out-port and captured in
 its way to the *Havanna*. He prayed leave to file a claim
 and produce proofs in order to manifest his right to
 the said cargo; and that the marshal might be ordered
 to hold the proceeds in his hands, subject to the future
 order of the court. This was done; and a commission
 issued to take his claim and answer, and examine wit-
 nesses in support of it. On the return of these papers
 it appeared beyond a doubt that the said Coulter was
 an American citizen, and that the cargo of the *Esper-*
anza, consisting of eighty four hogsheads of molasses,
 were his property at the time of the capture.

Money or
 goods in the
 hands of the
 Marshal by
 order of this
 court are
 subject to
 any further
 order of
 court; and
 claim may
 be made to
 the same, af-
 ter a decree.
 Not so, if the
 money has
 been paid
 over.

On this claim and these proofs, counsel were heard
 for the said Coulter in support of his claim; and for
 the British consul on behalf of the owners of the pri-
 vateer.

N

For

1799:

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L'Esperanza.

For the latter it was contended, that the court has already pronounced its decree in this cause, and cannot review or alter it.

That the question of prize or no prize can only be determined in a court of the captors.

That the sale by consent of the parties to the decree ought not to injure their rights, but that the monies arising from the sale of the cargo should be considered as the cargo itself would have been before the sale. And the British consul offered to retain the proceeds of sale till the question could be tried in a court of admiralty of Great Britain.

That the decree was not interlocutory, but final; that, as such, it secured those who purchased under it; and that the 25th article of the treaty with Great Britain deprived this court of further jurisdiction.

On the other side it was insisted, that this vessel was not, on her arrival here, in possession of the British, but had been abandoned at sea, and brought in by an American captain; that, therefore the British treaty did not apply.

That the claimant would be without remedy, except in this court.

That the rights of a third person being involved, the court may review the decree.

The case appears to me important, and I have considered it with much attention. I am of opinion that decrees of this court, completely carried into effect, can only be affected by appeal to a higher tribunal. But it has long been settled that the court may control its officers, and that money in their hands by order of the court is subject to *further* order thereof, until paid over.

That parties concerned who had no notice of the proceedings are entitled to a hearing, more especially as they have no right to *appeal*.

Coulter would, I apprehend, be altogether without remedy,

remedy, if this court does not give it to him. I do not see how a British court of admiralty could hold jurisdiction of this vessel *after abandonment*; for neither *res* nor *persona* is within its reach. The libel for salvage brought this subject properly before this court in the first instance; and it is an established principle that matters necessarily flowing from or dependent upon the first cause of action shall follow the original rights of jurisdiction. *Hopk.* 140.

1799.

Coulter

v.

Schooner

L'Esperanza.

If I had referred the American captain's claim for salvage to a *British* court, I should have yielded up the powers of this. The *Esperanza* was brought in here as *abandoned*; as such, the court interfered to settle the claims of the different parties. The question of prize was cautiously avoided. Had *Coulter's* claim been brought forward at first, no doubt could have attached to it; for, by our treaty with *Great Britain*, the goods of either party found on board the vessel of an enemy shall be restored. To have decreed, therefore, restitution of this cargo to *Coulter* would have been no more than a fulfilment of that treaty.

Upon the whole, I adjudge, order, and decree, that *Coulter* receive the money for which his molasses sold, after deducting the salvage allowed by my former decree, the costs of both suits, and a reasonable freight. Let this be fixed by the registrar and one or two merchants, if he thinks proper to call for their assistance; and let the *freight* and amount-sales of the *vessel* be paid to the British consul for the benefit of those entitled to the same

O'Hara

1798.

June 4.

Of three several sums advanced for repairs and outfit of this vessel, one only could attach as a sufficient lien to give jurisdiction to the admiralty; and that security having been changed, the libel was dismissed *in toto*.

O'Hara et al. v. Ship Mary.

THE libel states three allegations whereon to found a claim against this ship.

1st. For 741 dollars, laid out by *Campbell and O'Hara* as ship's husband, at *Jamaica*, for the benefit of the owner and owners of said ship, (and particularly for the benefit of *J. G. Glover* of *New-York*, the proprietor of the ship by virtue of a bill of sale or transfer from *Richard Hughes*, the registered owner) to procure insurance on her intended voyage from *Kingston* to *Charleston*.

2d. For 402 dollars, advanced by a Mr. *Earle*, in *Jamaica*, to the captain, for necessaries for the ship; for which sum the captain drew a bill on the reputed owner of the ship, expressing that the same was for and on account of the disbursements of the ship. This bill was afterwards *indorsed* by *Daniel O'Hara and son*, that *Earle* might be enabled to negotiate it. This was done at the particular request of the captain, who, in consideration thereof, agreed to deliver, and actually delivered, possession of the ship to these indorsers, as security. They now hold the ship for that purpose; and the bill having been protested and returned, it is insisted that the ship must be considered as duly hypothecated.

3d. For 600 dollars, advanced by said *Daniel O'Hara and son* in *Charleston*, to the captain for wages of the crew. For this sum also another bill was drawn by the captain on *Glover*, the reputed owner, for value received in the disbursements of the ship. This transaction was also, by agreement of the captain, to be considered as an hypothecation of the vessel; and this bill, too, was protested. To reimburse these several sums the libel prays that the ship may be sold, and the balance,

lance, if any, paid to said *Daniel O'Hara and son*, for 1798.
and in behalf of said *Glover*, who is legally entitled ^{O'Hara et al.} thereto as purchaser from *Richard Hughes*, the regis- ^{v.} tered owner, for valuable consideration expressed in the bill of sale.

To this libel a claim has been interposed by *Richard Morgan*, of *New-York*, setting forth a bill of sale, for valuable consideration, from *Hughes* to him, dated 23d *February* 1797, by which he became lawful owner of the ship agreeably to the act of congress; the vessel being at that time in parts beyond the seas. Claimant prays that the ship may be adjudged to him, or be sold to satisfy him for money due to him.

Richard Hughes, the registered owner, has interposed a plea to the jurisdiction, inasmuch as the several contracts and causes of suit, if any exist, were made on land, within the jurisdiction of the courts of common law, and not of the admiralty.

The captain who was, at first, made a party, has been since admitted as a witness, by consent of all parties.

Several exhibits have been filed; particularly two letters of *J. G. Glover*. One of these is to *Campbell and O'Hara*, at *Jamaica*, dated 16th *December* 1797: the other is to *Daniel O'Hara and son*, dated 1st *May* 1798.

In support of the jurisdiction of the court it is contended,

1st. That the money furnished in *Jamaica* by *Earle*, was advanced in a foreign port, and for necessary supplies, and that a lien on the vessel was created, though there was no express hypothecation, nor other written evidence than a bill drawn by the captain on the owner.

2d. That the money paid to procure insurance on the ship was also absolutely necessary, as the vessel could not have proceeded without it.

3d. That the 600 dollars, supplied in *Charleston* by *O'Hara*

1798. *O'Hara and son*, to pay the crew, was not less necessary; and that the parties previously agreed that the ship *Mary*. ship should be considered as pledged therefor. That *Charleston* is a foreign port, as relates to *New-York*, though both are under one government. That if either of these points be sustained, the court must exercise jurisdiction, and direct a sale.

I shall, at present, take notice merely of the plea to the jurisdiction.

To constitute a right to hypothecate the ship, there must be urgent necessity, in a foreign port, and a total want of sufficient personal credit. 3 *Mod.* 244.

Apply this rule to the present case. When this ship arrived at *Jamaica*, she had made 1600 dollars freight. She had met with a gale of wind, and been forced into *Curraçoa* to refit; there she disbursed 825 dollars for that purpose, and had remaining 775 dollars. This was on the 29th *November* 1797.

While she remained at *Jamaica*, waiting, but without success, for freight home, *Earle* supplied 402 dollars. The captain says, *Earle* objected to the vessel's sailing till he should be paid; but that he afterwards agreed to come here in the ship, which he considered liable to him for the above sum. About this time *Glover's* letter to *Campbell and O'Hara* must have arrived; it is dated at *New-York* on the 16th *December* 1797. The whole business was now changed. They, as *Glover's* agents, seized the vessel, turned out the captain, and put in another; but afterwards reinstated the same, upon an express agreement that he should carry the ship to *Charleston*, and deliver her to *Daniel O'Hara and son*. It must have been at that time that the insurance was made, for which the captain drew a bill of 714 dollars on *Glover*. Is it possible, under these circumstances to say there was a want of personal credit on the part of the supposed owner, *Glover?* *Campbell and O'Hara* acted by his directions, with a bill

bill of sale of the ship from *Hughes* in their possession, 1798.
and orders to attach her if they could not make good ^{O'Hara et al.}
terms with the captain. This clue unravels the subse- ^{v.} *Ship Mary.*
quent proceedings.

The libel states that the insurance was made by *Campbell and O'Hara*, as ship's husband. Does this shew a want of personal credit in the captain sufficient to create a necessity for advancing money upon the security of the ship, and to give jurisdiction to a court of admiralty? surely not.

As to *Earle's* claim for 402 dollars, he had a lien on the ship for that sum in *Jamaica*, which he relinquished by coming here in her, and receiving payment from *O'Hara*. Had he libelled for this advance in *Jamaica*, or upon his arrival in *Charleston*, his suit must have been sustained. As the transaction now stands, that lien is gone.

As to the 600 dollars paid for wages of the crew, by *Daniel O'Hara and son*, and for which the captain drew a bill on *Glover*, this reasoning applies more strongly than to either of the other sums. Without deciding whether this can be deemed, in any sense, a foreign port, as relates to another of the *United States*, it is clear that every step taken by *Campbell and O'Hara*, in *Jamaica*, or by *Daniel O'Hara and son* here was taken by them as agents for *Glover* of *New-York*, owner of this ship. *Glover's* letters to them sufficiently evince this; from the last of which it is clear that the admiralty has no jurisdiction of this question. In that, *Glover* tells them that the bill for 741 dollars for insurance (the first allegation in the libel) will be due on the 15th *May* last, and *that he will take it up*.

Upon the whole, it appears that these parties have mistaken their remedy by applying to a court of admiralty. What redress they may have in equity, or at common law, it is not for me now to say.

I adjudge and decree that the libel be dismissed,
with costs. *Arnold*

1798.

July 14.

Motion for a new trial does not suspend the entering of judgment after one verdict; but execution will be stayed on application to the court.

Arnold v. Jones.

NOTICE has been given in writing to the attorney of the plaintiff, that a motion for a new trial will be made in the circuit court in *October* next, or sooner if possible; and reasons are assigned in the said notice agreeably to the 30th rule of court as established in *May* term 1797.

The question for my determination is whether by any law of the *United States* the defendant may stay judgment till the next circuit court; or whether the 18th section of the judiciary act is to be strictly followed. It is not contended that the right of new trial is taken away, though modified by the latter. This 18th section has, indeed, entirely altered the system pursued in the state courts, and derived from those of *Great Britain*; and the same is done by other parts of the judiciary act; which also gives a general power to the courts of the *United States* to make rules for the government of their own proceedings. In doing this, great care has been taken to avoid what might be repugnant to the laws of the *United States*; and the act of *March 1793*, entitled "an act in addition to the judiciary act" expressly provides, that all such rules and orders as may at any time be made shall be fit and necessary for the advancement of justice, and to prevent delay, &c.

The judiciary act also holds out the doctrine of appeals from the inferior courts in almost every instance, and has materially changed the common law in this respect. The system provides that, in cases of writs of error, and motions for new trial, *execution* may be stayed, on certain conditions; and motions for new trial are allowed by it *after* judgment contrary to the practice at common law.

Writs

Wrts of error, if lodged within a prescribed time, operate as a *supersedeas* to execution; and so far the interests of *one* of the parties is consulted. On the other hand, this writ cannot be had till security is given to answer damages. Motions for new trial may also be granted even after judgment; but such judgment shall be signed and stand as security in the first instance; after which, on petition, and certificate of the judge, that he allows the same, execution shall be stayed to the next circuit court.

1798.

Arnold

v.

Jones.

If these cautions were disregarded, the consequence would be a delay of justice almost equal to a denial of it. Motions for new trial might succeed each other to the ruin of the plaintiff, and in spite of two or three verdicts in his favour; and the 18th clause of the judiciary act would be rendered nugatory. It is true, that at common law, a *third* trial has sometimes been granted, but only under peculiar circumstances. Besides which it must be recollect that the verdict of a jury cannot otherwise, by that system, be reconsidered. Whereas, after new trial in the courts of the *United States*, the dissatisfied party may still appeal to the supreme court, if the matter in dispute exceed the value of 2000 dollars.

Upon the whole, I think the law intended that judgment should be signed previously to the motion for a new trial.

Ellison

Q

1798.
September.

Ellison et al. v. Ship Bellona.

Courts of admiralty cannot properly apply to maritime contracts the same strictness that prevails at common law. If a vessel be intended to cruise as well as trade, the seamen's articles must be construed with reference to this double object.

THIS is a cause of considerable importance between foreigners in a neutral court; and as it may lead to the establishment of a precedent, I have considered it with great attention.

The libel is exhibited by twenty-four seamen of this ship for wages from the 20th *May* to the 27th of *August*. The causes of complaint are

1st. A deviation from the voyage specified in the articles, and a prolongation of it by continuing twenty-three days off the coast of *La Vera Cruz*, instead of a few days, as agreed on.

2d. Severity on the part of the captain towards some of the crew.

3d. A discharge of part of the crew, since their arrival in this port.

To this libel the captain interposes a claim, answer, and plea, on behalf of himself and the owners of the *Bellona*, a private ship of war belonging to subjects of *Great Britain*, and acting under letters of marque against *France*, *Spain*, and *Holland*. The plea (to the jurisdiction) has already been set aside; it remains for me to decide upon the answer and claim.

These state two sets of articles, by one of which the crew are bound to proceed to the coast of *La Vera Cruz*, there to lie off and on for a few days, till the cargo should be landed; from thence on a cruize for six weeks, after which they were to return to *Jamaica*, as the master should direct.

By another set of articles signed the same day the libellants shipped themselves as seamen on board the *Bellona*, as a private ship of war, letter of marque and reprisal, on a cruize from the harbour of *Port-Royal* against the ships and vessels of *France*, *Spain*, and the *United Provinces*.

The

The answer denies that *all* the seamen behaved as they were bound to do, some of them having been disorderly and disobedient: some, who entered as able seamen were but ordinary; and others who knew and could perform their duty, neglected it on various occasions.

1798.

Ellison et al.

v.
Ship Bellona.

It is denied that the voyage was prolonged on the coast of *La Vera Cruz* contrary to the true meaning and intent of the articles. Severity towards some of the libellants is admitted, as proceeding necessarily from their disobedient, disorderly, insolent, and mutinous, temper and conduct. Ill treatment beyond this exercise of discipline is denied.

The answer admits that four of the libellants were allowed by the mate, in the captain's absence, to go on shore for one hour. They did not return in twenty-four hours; whereupon the captain refused them permission to go on board: he is now, however, ready to receive them.

It is admitted that the clothes and wages of others of the libellants, who are named, were detained because they deserted, and were not entitled to wages until their return to *Jamaica*. The captain, nevertheless offers to take these men, also, on board, and to pay their wages in *Jamaica*, if they do their duty according to the articles.

As to five seamen, who behaved so mutinously on board as to make their reception dangerous, the captain submits to the direction of the court, professing his utter unwillingness to let these people come on board.

From this statement of the pleadings, three points arise for my decision.

1st. Whether the stay off the coast of *La Vera Cruz* is such a prolongation of the voyage as amounts to a breach of the articles.

2d.

1798. 2d. Whether the captain's severity to part of the crew will justify me in decreeing payment of wages
Ellison et al. v. Ship *Bellona*, and a discharge to *them*.

3d. Whether such as were voluntarily discharged in this port, and such as were refused admission on board for absence beyond their leave, are entitled to wages in the one case, and to wages and discharge in the other.

In determining the first point, the mercantile, not the warlike, character of the ship must be considered. She had a valuable cargo, great part of which was to be landed there. The seamen were shipped in a double capacity; they were to have wages, as belonging to a merchantman; and prize money as belonging to a letter of marque. The case quoted from *Hopkinson* 122, must be so construed as to protect the captain and owners, as well as the seamen, against too strict a construction of their contracts. In privateers monthly wages are not paid; the *trading voyage* occasioned their being stipulated for here. There was no wanton delay. The person, a Spaniard, who had agreed to purchase these goods, and to pay for them at *La Vera Cruz*, sailed in the *Bellona* from *Jamaica*, and left them at the *Isle of Arcos* that he might be ready with the money as soon as the ship should arrive off the coast. They cruized five or six days before he made his appearance. The goods were on deck and ready for delivery by the time this man and his boats were along side the ship. He had brought no money, and there was, of course, no delivery of the cargo. It appears, however, that he promised to return, prepared to pay for what he had bought. Would the captain, under such circumstances, have been justified to the freighters and owners if, by sailing away, he had totally defeated every purpose of the *trading voyage*? I think not.

The

The Spaniard's return might be daily expected; 1798. wages went on, and the crew were liberally supplied. Ellison et al v. Ship Bellona. They knew the cargo was to be discharged *at sea* into *Ship Bellona*. boats; and that this must occasion additional delay and uncertainty. It might have been prevented for a week or ten days by rough weather. Would *that* have amounted to a deviation from the articles? Should the great interests of those concerned in this mercantile speculation have given way entirely to the commencement of a cruize in which no *certain* interest was involved? At any rate, the vessel would have been much fitter for her business of cruizing, after the discharge of her cargo. *Hopkinson*, 122. lays it down that the constant practice of this court shews a greater liberality prevails here, in the construction of *maritime* contracts, than is found in the strictness of common law doctrines. This law applies to the case before me. An equitable construction of the articles, and the circumstances of the case concur to forbid my considering the delay off *La Vera Cruz* as a deviation sufficient to sustain this part of the libel.

The point of ill usage comes next. Of fifty men composing the crew, eight only complain of this. Four of these were in irons, some for a shorter, some for a longer time. One was threatened with death. The prizemaster put on board a captured vessel was shot at by the captain, while the prize was in tow, and cut over the head in the harbour. *Ellison*, upon giving some provocation, was desired by the captain to take his choice of a brace of pistols. This man, with two others, were ordered to remain below; but this, it seems, did not prevent their coming on deck when they pleased. They were refused cabin allowance, but received ship's allowance from the cook. It is difficult for the judge of a neutral nation, not fully acquainted with the *lex loci* of the parties, to determine with precision questions of this sort; and I am happy to avail myself

1798. myself of the eloquent and able sentiments of a great admiralty judge, sir James Marriott, as I find them delivered to the jury in a cause tried before him about six years ago. I have transcribed the charge verbatim, as well on account of its intrinsic merit, as because it appears strictly applicable to this ground of the libel before me.

" You will call to mind continually," says he, " the state and condition of the parties concerned, the nature of their lives, business, and necessities. Consequently, in judging of matters committed on the high seas, you will take into view the state of society upon that element, where all is violence. This consideration makes a great difference between actions at sea, and actions on land, where every thing comes within sight and knowledge of the neighbourhood, and where the peace and tranquillity of the subject is generally secure under a mild and moderate government. You have to judge of ferocious men, possessed of few, but strong ideas, peculiar to their employment; of men hardened by danger, and fearless by habit. The subjects of your deliberation are actions done on a sudden, vehement from the nature and necessity of the occasion. The preservation of ships and lives depends often upon some act of severity, but necessary, discipline. These scenes of violence present no very amiable picture of human nature; but such violence is frequently justifiable, sometimes absolutely necessary; because, without it, no commerce, no navigation, no defence of the kingdom can be maintained. The consideration of this should soften the rigour of judgment which might otherwise be made, on land, by persons ignorant and inexperienced of what is done at sea. It is painful to observe that, without the greatest care in weighing of evidence, no commander or officer of a ship can be safe upon his trial. In charge of the lives and

"and properties of other men, contending with the 1798.
"most ferocious, upon an ungovernable element, a Ellison et al.
"commander is placed every moment in danger of Ship Bellona.
"the loss of character and life. A ship is a little go-
"vernment, compressed into a narrow compass, in
"which there can be no hope of security for any man
"on board, without a rapid and strong occasional ex-
"ertion of an absolute power placed in one man. Like
"other governments and situations, the command of
"a ship is open to the most horrid general combina-
"tions and conspiracies with all their consequences,
"fit to make the stoutest heart tremble. The passions
"operate, at sea, without control; and all, on board of
"a ship, is too often a scene of misery, terror, disor-
"der, disobedience, resentment, and revenge."

Let these Englishmen be judged by this rule of one of the ablest of their own lawyers, and then the conduct of the captain of the *Bellona* will appear in a more favourable light than it has been represented. Nevertheless, there are some parts of it highly censurable, particularly as to the man appointed to the command of the prize; and as to one other whom he threatened to shoot. If he had done it, I should have thought it murder; but if it was only *in terrorem*, it may well come within the necessity so ably stated by sir *James Marriott*.

Upon the third point I am of opinion that *Donnel* the prizemaster, is entitled to his discharge and wages. The five men whom the captain is anxious to exclude from his ship may be discharged; but their wages must be paid. Those that left the ship before she was moored, under a short leave of absence, as they pretend, from the mate, were guilty of gross misbehaviour in extending it to twenty-four hours; but as the captain has offered to receive them again, and to pay them according to the articles, I shall not pronounce the contract dissolved. They were the aggressors, and must

not

1798. ~~not be allowed to take advantage of their own wrong.~~
Ellison et al. Let them go on board and complete their voyage.

Ship Bellona. I recommend to the captain to forgive and forget what has passed, and direct that he pay all costs of suit, since his refusal to receive some of the men on board occasioned a general application to this court for redress.

September.

Letters of
marque dif-
fer in their
character
from nation-
al ships of
war, or pri-
vateers, in-
asmuch as
they are em-
ployed for
commercial
purposes,
and are only
allowed to
cruize occa-
sionally. Sea-
men on
board oflet-
ters of
marque may
sue for their
wages in a
neutral port.

IN arguing this plea to the jurisdiction of the court, two grounds were taken.

1st. The law of nations.
 2d. The 25th article of the treaty between *Great Britain* and the *United States*.

Under the first head it was contended that, as this is a vessel of war equipped by a foreign power for capturing vessels of its enemy, and furnished with articles peculiar to such vessels and different from the common engagements made by merchant seamen, the court cannot interfere on this occasion.

It is undoubtedly true (and so adjudged in *Hopkinson* 104.) that mariners enlisting on board a ship of war or vessel belonging to a sovereign independent state, cannot libel for wages due; and the reason is that seamen in such case look to the government of their nation, by whom they are employed, and who undertake that they shall be paid.

In privateers, whose commissions are altogether of a warlike nature, it is settled by contract between the owners and crew what share of prize each party may claim; and before the seamen become entitled, the validity of every prize must be determined. This can only be ascertained by a court of the nation to which the

the captors belong; neutral nations have no sort of jurisdiction therein. 1798.
Ellison et al.

But the case is materially different with respect to letters of marque, which are trading vessels, armed, and commissioned to cruize occasionally. Ship Bellona.

The *Bellona* is one of these. It appears that she was fitted out at *Leith*, on a voyage to *Jamaica* with a cargo of great value, consigned to the captain and another person on board. The crew, consisting of about forty men, was shipped under articles. The vessel arrived at *Jamaica*, where this crew quitted her from some motive of dissatisfaction as to the further voyage; and a new crew was shipped under new articles which describe the new voyage, and stipulate what wages should be paid.

It appears that part of the cargo on board was on freight to *La Vera Cruz*, and that, when this should be landed, the vessel was to cruize for six weeks.

For the regulation of this cruize another set of articles was signed, by which it was fixed that the owners were to have three fourths of all prizes, and the seamen the remainder. The stipulated wages are decisive of the *commercial* character of this vessel, and distinguish her from a privateer.

Courts of admiralty have a general jurisdiction in causes civil and maritime; and the 9th section of the judiciary act of congress vests that power in this court. The case of seamen's wages comes within this description of causes; and this jurisdiction has been uniformly exercised by me, as regards foreigners generally. The consular convention with *France* formed a single exception in relation to seamen of that nation. If, then, the court is entitled to look into and decide upon the articles of seamen engaged on board a merchant vessel, shall that jurisdiction be ousted merely because the vessel is armed?

P

In

1798. In cases of bottomry and hypothecation, the power of Wilson et al. the court seems to be conceded; why not in the case ^{v.} Ship Bellona. of wages also?

If a vessel arrive here and it appear that the voyage was to end, or the seamen to be discharged, in this port, no objection could be made to the enforcement of the contract. It is the daily practice of our courts, as well as those of *England*; both are guided by the *lex loci*, and regulate their decisions accordingly. I very lately discharged two seamen from a British armed ship, because it appeared by the articles that they had engaged only to come to this port.

The 25th article of the treaty with *Great Britain* has been relied on in the second place. But this evidently relates merely to prizes.

It is found in all our treaties, and generally in those between commercial nations possessed of a naval power. It provides that the neutral power shall not take cognizance of prizes, and permits the captor to have an asylum in our ports till he shall see fit to proceed, with his prize, to the ports of his own nation. But this by no means excludes jurisdiction as to incidental matters not connected with the question of prize.

Before this provision by treaty, neutral courts were frequently induced to restore prizes brought within their jurisdictional limits; that practice is effectually restrained by the clause relied on.

Yet there are cases *even of prize* where this court will interfere.

It will restore *American* vessels brought as prize into this port.

It will divest a French privateer of his British or Dutch prize *taken within our jurisdictional limits*, or by a vessel *fitted out in our harbours*. French prizes, under similar circumstances would be restored, without regard to the claim of a British or other captor.

Each of these cases has occurred, been decided, and

and confirmed in every stage of appeal. The law is 1798.
therefore, fixed.

Ellison et al.

Ship Bellona.

But it is said that this power of discharging the crew of an armed vessel amounts to a power of laying her under embargo, for that she is prohibited by our laws from recruiting in our ports. In support of this argument, the act of congress of June 1794 was quoted. That act is declaratory of the law of nations, confirms all the doctrine cited from *Vattel*, and provides, *inter alia*, that no foreign armed vessel shall add to her force, within our ports, by augmenting the number of her guns or other equipment solely applicable to war, nor enlist men for the service of a foreign state. But it has been determined, under this clause, that repairs necessary to put a vessel in *status quo*, alterations in the manner of her equipment (without adding to her force) and the shipping of men to the amount of the original number that composed the crew, are not such infractions of the treaty as call for the interference of the court.

If every man in the *Bellona* were changed, I should decide that our neutrality was not committed, provided the ship carried out the same number, and no more, than she brought in.

I should willingly have got rid of the trouble that must attend an investigation of the merits of this cause. But I hold myself bound by law to retain the suit, and to direct that the claimant answer over.

Bulgin

1798.
October 3.

If the master borrow money for repairing damages to the vessel done on the high sea, the admiralty has jurisdiction.

Bulgin v. Sloop Rainbow.

THE libel states that the sloop *Rainbow*, Session master, took on board, in the port of *New-York*, in *June* last, certain goods, wares and merchandize consigned to the actor, Mr. *Bulgin*, in *Charleston*.

That, on her voyage, she was so much damaged in a gale of wind as to be forced into the port of *Wilmington*, in *North Carolina*, where it was found that considerable repairs were necessary to enable her to proceed to *Charleston*. That the master, having neither funds nor credit, disposed of part of the actor's said goods to raise money for payment of these repairs and outfits: and the libel prays that the vessel may be sold to reimburse the same, with damages and costs. Several exhibits are filed with the libel, viz.

1st. An account, amounting to nine hundred and ninety eight dollars, being the value of the goods sold, with an advance thereon.

2d. A certificate, signed by two merchants here, of the difference between the original invoice, and the goods delivered.

3d. A protest of the master at *Wilmington*, accompanied with a certificate of two shipmasters and two shipcarpenters of the damage sustained by the vessel, and of the repairs necessary to fit her for sea.

4th. An account-sales of the articles, and also one of the expenditure of the money.

A plea to the jurisdiction of this court has been interposed by *William Harding*, owner of the sloop, stating that the matters and things contained in the libel, if they ever took place at all, were transactions on land, of which this court has no cognizance.

That they must be referred to a court of common law.

That

That no express hypothecation is produced, and no 1798.
implied one will subject the vessel to sale.

On the part of the libellant it is insisted that hypothe-^vcations may be implied as well as expressed.

That, for supplies furnished or money advanced, a lien is created, of which this court has jurisdiction. And that the master, having sold goods to raise money for the use of the vessel, must be considered as the agent of *Bulgin*, to whom the goods belonged; and that an hypothecation must be implied.

This is the first case of the kind that has been brought before me, and I have considered it with attention. The only question now is whether the jurisdiction of the court extends to it. Of all the cases cited, not one came up to the point. The cause lately decided by me, of *Jones v. Schooner Massachusetts*, was very differently circumstanced. That was a suit on a bill of lading of goods at the *Havanna*, to be delivered in *Charleston*. They were delivered, but it was alleged that part of them had been damaged in this harbour. As the contract was made on land, and the damage done in port, I dismissed the cause as appertaining to common law jurisdiction, exclusively. But here, the vessel sustains such damage at sea as forces her into port to refit; to effect which, and enable her again to put to sea, the master raises money by this sale of the actor's goods. The cause then of the transaction arose at sea, and it is agreed that incidental matters follow the original jurisdiction, whatever the nature and complexion of those incidents may be.

It is laid down in a treatise *de jure maritimo et naval i* 444. "That if a master take up money to mend or victual his ship, without occasion, he alone shall be liable, though generally the owners shall answer the fact of the master. But if there was cause of mending the ship, though the master spend the
" money

1796. "money another way, yet the owners and ship become
 Bulgia "liable to satisfy the creditor."

Sip. Rainbow. In the same book 450, it is said, that "owners
 "should be cautious whom they appoint to the com-
 "mand of their vessel, since his act subjects them to
 "answer any damage, or other thing he may do in re-
 "ference to his employment. That, if need be, he may
 "in a strange country borrow money upon some of
 "the tackle, or sell some of the merchandize; the
 "owner of which shall receive the highest price that
 "the remainder of the goods obtain." (See 2 Peters'
 Adm. Dec. Appendix 67, 79.)

The first section of the laws of *Oleron* is quoted in support of this authority, which, I think, is sufficient to sustain the jurisdiction of the court on the present occasion. These laws and others of the same maritime nature must be our guides.

I consider the storm *at sea* as giving rise to this transaction of the master. The vessel could not have left *Wilmington* without the repairs she got there, and the captain was justifiable under his circumstances in borrowing this money. It was solely for the use of the vessel; and reason, as well as law, makes her liable.

In *Viner* 529, the captain of a vessel pawned his own person for the ransom of his vessel, taken by pirates. They carried him to *Sicily*, where he borrowed the money, gave bond for it, and redeemed his person. On his return to *England*, he sued for this money in the admiralty, and recovered it. Prohibition was denied upon application to a court of common law.

I am of opinion that the plea to the jurisdiction be dismissed, and that the defendant answer over.*

Marcus

* See *Peters' Adm. Rep.* Appendix 74, vol. ii. where it is said, that "if a fault of the master respecting the cargo be committed *enfer altum mare*, the admiralty shall have jurisdiction." *Secus*, if on land. The distinction seems strictly applicable here.

EDITOR.

Marcus Minors et al. v. Ship Mary.

1798.
October.

THIS is a suit for seamen's wages, and a certificate of the captain is produced, in which he acknowledges the amount due.

It is objected, that these seamen had assisted the captain to carry the vessel out of her course.

That these wages accrued in port, when the vessel was earning no freight, and was in custody of the marshal.

That all wages due up to the time of the vessel's arrival had been paid.

The only question is whether the owners of the vessel are answerable for the act of the captain in this instance. I think they are.

Captain Dillingham was master of the vessel at her arrival here, on the 27th *February* last. On the 10th *April* the marshal took charge of the vessel, by order from this court. On the 1st of *June* following she was discharged from his custody. The actors in this cause continued on board the whole time, considering themselves bound to do so.

They demand wages from 1st *March* to 1st *June*; and the captain certifies their right to them. They can produce no higher evidence, for they cannot compel the production of the articles; nor have the other parties brought them forward.

Let the marshal sell this ship, or so much as may be necessary, and let these wages be paid, with costs of suit.

John

1798.
Nov. 25th.

John Tunno v. Ship Mary and Henry White.

A bottomry bond can be entered into by the master only under circumstances of great distress, and when he has no other means of repairing, &c.

THIS is a suit on a bottomry bond executed by *Henry White*, master of the ship *Mary*, in the port of *London*, November 9th, 1797, to *John Tunno*, for the sum of 1466 pounds sterling; with a premium of thirty per cent. payable within ten days after the arrival of the ship in *Charleston*.

A claim and answer are filed on the part of *Asher Robins* of *Newport, Rhode Island*, as owner of this ship at the date of the bond, and from the 19th *July* preceding. It is alleged that the said bond was not executed in good faith, nor upon the principles of maritime hypothecation; and the claimant prays that the libel may be dismissed with costs.

The replication to this claim and answer, denies that *Robins* was owner of the *Mary* on the 19th of *July*, averring that she was at that time registered in the name of *Cyprian Sterry*, who held her as trustee for the joint account of himself, *Tunno* and *Cox*, and *Miller* and *Robertson* of *Charleston*, merchants. That although a bill of sale to *Asher Robins* might have been executed on that day, yet he was fully informed by *Sterry* of the trust aforesaid, and received the bill of sale subject to the equitable rights of the joint concern. That *Henry White* was appointed master by the said *Tunno* and *Cox*, and *Miller* and *Robertson*, with the full knowledge and approbation of said *Sterry*.

The replication further states that the voyage from *London* to *Charleston* was not ordered by *Tunno* and *Cox*, and *Miller* and *Robertson*, but originated in necessity arising from the unexpected failure of *Sterry*, and his inability to advance funds for a different voyage, which had been contemplated by the owners of the ship previously to her leaving *Charleston*. It is admitted

ted that *John Tunno* was the usual correspondent of *Tunno* and *Cox*, and *Miller* and *Robertson*, in *London*; but was totally unknown to *Sterry* or *Robins*. John Tunno
V.
Ship Mary. That at the time of the execution of the bond he had no money in his hands of *Sterry* or *Robins*, nor of *Tunno* and *Cox*, or *Miller* and *Robertson*, after appropriation of the out-freight of the ship from *Charleston* to *London*; nor could the captain have raised any on the personal credit of his employers. He was, therefore, under the necessity of thus pledging the ship.

A rejoinder to this replication denies that *Tunno* and *Cox*, and *Miller* and *Robertson* were joint owners of the ship, insisting that *Robins* is sole owner by legal conveyance of 19th *July* 1797, from the former registered owner. It also denies that *Robins*, at the time of sale and advancing of his money, had any notice of any interest or claim to the ship, in *Tunno* and *Cox*, and *Miller* and *Robertson*. It states that *John Tunno* received 1188*l.* 8*s.* 10*d.* for the out-freight of the vessel, that he was the usual correspondent and agent of *Tunno* and *Cox*, and *Miller* and *Robertson*; and that he acted under their orders, touching the ship and cargo.

There are other allegations on both parts which do not appear to be material. A number of exhibits have been filed, and the evidence of Mr. *Russel* taken, *viva voce*, in court.

The point for my decision is, whether this bond creates such a lien on this vessel as to give jurisdiction to the court.

The law respecting hypothecation requires that it be the voluntary act of the master *when* and *where* money was advanced for necessaries or repairs. The money ought to be advanced solely on the faith of the hypothecation and not on any personal credit, in a foreign port, and in such distress as that the *voyage* could not be completed without it.

1798. It appears that this ship sailed from this port about John Tunno the 25th *July* 1797, bound to *London*; that at the time of her sailing she was owned by *Sterry, Tunno and Cox*, and *Miller and Robertson*; that she had completed her lading on the 18th *July*; and, on the 19th, *Sterry* who resided in *Rhode Island*, sold his right in her and her earnings from a period antecedent, to *Robins*, the present claimant. His letter of the 29th *July* to *Miller and Robertson*, received by them on the 13th *August*, was the first notice they had of the sale. It appears, however, by a letter from *Tunno* and *Cox* to *John Tunno*, of the 5th *August*, that *they* had advice of *Sterry's* failure, on that day.

I have called these gentlemen joint owners with *Sterry* of this ship, and I am authorized to do so by the exhibits, among which are *Sterry's* accounts between himself and them as joint owners of the vessel; a letter from *Miller and Robertson* to *Sterry* after the ship was loaded, in which they express a purpose of purchasing a further share in her; *Robins'* letter to them, in which he says: "Mr. *Sterry* informs me "that, by contract, your house are owners of one third "of the ship; I wish to know if you would not be inclined to take the whole ship to your account, and "on what terms."

The question of law, arising under the act of congress on the assignment and change of the register, is for another tribunal, and it would be improper that I should anticipate its decision. There is sufficient proof before me as to the acts of ownership of *Tunno* and *Cox*, and *Miller and Robertson*, on which to found my present decree.

I will proceed to consider the evidence, after the ship was loaded, and after she had sailed. The captain's instructions are dated on the 18th *July*, and contain as clear and positive a consignment of vessel, cargo, and captain as could be devised. "When you arrive,

"rive, you will deliver the ship's papers to *John Tunno*.
 "no, under whose directions you are on that side the *John Tunno*
 "water; his orders you will attend to, and no other. *Ship Mary*.
 "He will furnish money and necessaries for the ship,
 "according to the voyage she goes upon, also *yourselves*
 "with what you may have occasion for. You are to
 "consider yourself as fully under his instructions as
 "if we were present, being our friend and attorney."

Miller and Robertson in a letter to *Sterry*, 18th *July*, say: "The ship *Mary* is bare of sails, a new suit must
 "be furnished in *London*, and will, with outfitts, take
 "all the freight."

It is evident, then, that at this period, freight was contemplated as the fund for outfitts in *London* for another voyage, and it was not till the 5th *August*, ten days after she sailed, that the orders were given to appropriate the freights in equal parts to *Tunno and Cox*, and *Miller and Robertson*; and this in consequence of advice that *Sterry* had failed. But we find the bill of sale from *Sterry* to *Robins* dated on the 19th *July* preceding, so that *Robins* was owner of *Sterry*'s share at the time this order is given to appropriate the freight. This surely cannot bind *Robins*, who was entitled to two thirds of the freight when the ship arrived in *London*, from which fund all necessary repairs and outfitts might have been made.

The whole freight to <i>London</i> amounted to	118 <i>£</i> .
Two thirds of this make	79 <i>£</i> .
The whole disbursements are	97 <i>5</i> <i>£</i> .
Two thirds of these are	65 <i>0</i> <i>£</i> .

which deducted from 79*£*. leave a balance of 14*2**£*. in favour of Mr. *Robins*, for his share of freight earned. Where, then, is any ground of maritime hypothecation, which, as I have already stated, can only arise out of an invincible necessity? I see none; and do, therefore, adjudge and decree that the libel be dismissed with costs.

Campbell

1798.
Nov. 25th.

Owner of a vessel not liable for barratry of captain and crew, beyond the sum mentioned in the charter-party: nor to repairs of the ship, if warranted by the owner to be kept staunch during the voyage. But in case of loss and expense by necessary deviation, both vessel and cargo must contribute in general average.

Campbell, Harvey & Co. v. Ship Alknomac.

THIS ship, belonging to Mr. Wood, of the state of Massachusetts, and of which *Wheelwright* was master, was chartered on the 30th January 1797, in the port of Liverpool, by *Anderson and Child, agents*, and *Wheelwright*, master, in behalf of the owner, to *Campbell, Harvey and Co.* merchants of Charleston; who, by the words of the charter-party, were to have the whole reach and burden of the ship (except the cabin and sufficient room for crew, stores, &c.) on a voyage from Liverpool to Greenock, then to Charleston; from thence to Cowes, Cork, or some other port in Europe, at certain stipulated freights. The vessel to be at the expense of the owner and master, and to be kept tight, staunch, and strong, well manned, victualled, tackled, and provided in every respect for such a voyage in the merchant service. For the performance of covenants in the charter-party, each party was bound in a penalty of 500*l.* sterling, to secure which, the agents of the owner and the captain bound the ship; and the freighters, the goods to be laden on board.

In pursuance of this agreement the ship proceeded from Liverpool to Greenock, and after taking in a full load of goods, sailed for Charleston about the 3d April 1797. After proceeding nearly two thirds of the voyage, she was captured by a French privateer, and ordered to Nantz.

Fourteen days after this, she was recaptured by a British sloop of war, and sent to Cork, where she arrived on the 30th May. Here the agents for the freighters paid the requisite salvage for ship and cargo, and she sailed again for Charleston in August; but, meeting with bad weather and contrary winds on this coast,

was

was compelled to put into *Norfolk*, in distress, in the beginning of November.

It is in evidence that when the ship arrived in *Hamp-ton Roads*, all the crew, except the two mates, left her. The captain, who was in bad health, went to *Norfolk*, and there prevailed on a Mr. *Dana* to act as agent. By his direction three several surveys were made, in consequence of which it was thought fit to land the cargo, that the vessel might be repaired and refitted for proceeding to *Charleston*.

Some parts of the cargo were found damaged; other parts had been plundered, and some goods were missing. Sundry articles sold, or offered for sale, by the seamen on shore, were seized and libelled in the district court of *Virginia*, as forfeited under the trade laws of the *United States*; but that court, being satisfied that they had been purloined from the cargo, ordered them to be given up to the agent.

As soon as it was discovered that many of the goods were missing, the captain and both mates followed the example of the others of the crew; left the vessel, and quitted *Norfolk*. The agent, therefore, hired another captain and crew, who brought the vessel to *Charleston* in February following.

It appears, also, that Mr. *Dana* sold at public auction such parts of the cargo as were damaged, to the amount of 3855*l.* *Virginia* currency; out of which he reimbursed himself for repairs and outfits of the ship at *Norfolk*, to the amount of 700*l.* sterling. For repayment of this sum, and for the deficiency of goods landed at *Norfolk* ascertained by the manifest and bills of lading, this suit is brought.

The claimant contends that the amount of repairs at *Norfolk*, having been occasioned by tempestuous weather, must be brought into general average. That any deficiency in the cargo must be attributed to the vessel's having been twice captured. That the master could

1798.
Campbell,
Harvey & Co.
v.
Ship Alku-
ma.

1798.

Campbell,
Harvey & Co.
v.
Ship Alkno-
macc.

could not prevent plunder or spoliation when he was not in possession of the vessel; and that the freighters of the *whole* vessel, must be considered as *owners* for this voyage, and, as such, have a remedy against the insurers, and are liable to other persons who had goods on board. That, at all events, *Wood's* responsibility is limited by the charter-party. As to the liability of *Campbell* and *Harvey* as owners *pro hac vice*, cases were quoted from *Park*, *Cowper*, and *Magens*. But these all related to insurance, and only shew that in case of deviation, considered as barratry, the insurers shall not be discharged from their insurance of owners *pro hac vice*, unless consent of *such* owners to the deviation can be proved. The consent of the *real owner* was determined *not* to discharge the insurers.

How is the case here? The owners *pro hac vice* had no control over the master; they did not appoint, nor could they discharge him; and, of course, shall not be liable for his acts. By the terms of the charter-party the ship was to be *kept* tight, staunch, &c. *for the voyage*; the owner therefore must bear the damages.

All necessary charges of unloading, reloading, anchorage, pilotage, storage, wharfage, and other such expenses incurred at *Norfolk*, together with wages and victualling of the crew from the day of consultation on board at sea as to seeking a port, till the day of her leaving *Norfolk* to return here, must be brought into general average. The difference between their own share of these charges, and the amount of goods sold at *Norfolk* must be paid to the actors in this cause.

The last point for my determination relates to the barratry committed by the master and crew. Is the owner of the ship liable for this? and to what amount?

There is a clear deficiency of thirty-six boxes, trunks, &c. said to be worth 3500*l.* sterling. This appears from a comparison of the manifest signed by the

the captain, with the report of a person employed by the agent at *Norfolk*, under the direction of a custom-house officer.

1798.

Campbell,
Harvey & Co.

v.

Ship Alkno-
mee.

But it is said that this proceeded from the double capture of the vessel. If so, it must have happened before the captain made his protest at *Cork*. He there mentions a quantity of porter drunk by the French; but not a word of any spoliation by the British: if any had taken place it might and ought to have been ascertained by survey, before the salvage was fixed and paid. Nothing *said* by the captain can countervail his *protest*.

It appears, however, that three boxes were sold at *Cork*, by the captain, for his own use. He confesses this; and that the sale produced 180*l.* Goods to a considerable amount were found on two of the seamen at *Norfolk*, and the decree of the district court there restored them as parts of the cargo. There is no *direct* proof that the others carried off their share; but it will hardly be *doubted*, when we consider that many bundles and boxes were found broken open and robbed, when the vessel was first boarded at *Norfolk*; and that all the seamen left her as soon as she arrived there, and were soon followed by the captain and both mates.

Indeed, so strong is my conviction upon this point that I should not hesitate to make the ship liable to the full amount of her value, if the charter-party were out of the way. But the parties have thereby fixed their own damages, and I cannot exceed them. Let this ship be sold, and from the proceeds let the actors receive the sum of 500*l.* together with all expenses incurred at *Norfolk* by the unloading, and detention of the vessel, beyond what they are bound to pay in general average. Let a statement of the amount be made by the register, and enrolled with this decree.

The

1798.

*Campbell,
Harvey & Co.
v.
Ship Alkno-
mac.*

The vessel sold for six thousand dollars. The mar-	
shal paid to <i>Campbell</i> and <i>Harvey</i> the following sums:	
Penalty fixed by charter-party,	500 <i>l.</i>
Amount of repairs, deducted from sale of	
part of the cargo,	548 <i>l.</i>
Ship's share of general average,	43 <i>l.</i>
	1091 <i>l.</i>

Benjamin Moodie v. Brig Harriet.

Salvage al-
lowed upon
recapture of
a ransomed
ship; the
ransom bill
declaring
that the sum
agreed upon
therein
should only
be payable
upon the ar-
rival of the
vessel at her
port of desti-
nation,
where she
never arri-
ved.

THIS is a suit instituted for salvage in recapturing the brig *Harriet* on the high seas, on the 26th of October 1798.

It appears, from the pleadings and proofs before the court, that this brig belonged to *Tunno* and *Cox*, and *Miller* and *Robertson*, merchants of this city.

That she sailed on the 8th day of October last from a Spanish port on the south side of the island of *Cuba*, bound to the *Havanna*.

That, two days after, she was taken, in sight of the island, by a French privateer called the *Betsey*; another privateer being in company.

That these privateers, finding the brig had no cargo on board, were preparing to set her on fire; whereupon the captain (*Lightbourne*) proposed to ransom her. This being agreed to, he drew an order, on a house in the *Havanna*, for two thousand dollars, the sum fixed; which order was payable upon the arrival of the brig at the *Havanna*, and was in nature of a ransom bill. Upon signature of this paper, the vessel was suffered to proceed on her voyage, captain *Lightbourne* being detained on board one of the privateers as a hostage.

A Frenchman, as prizemaster, and two American seamen were sent on board from the capturing vessels; but

but they did not interfere in the management of the vessel, leaving this wholly to the mate, who took the command, and made the usual entries in the logbook. Benj. Moodie
V.
Brig. Harriet.

Some days after this they fell in with an American armed brig, who, finding that the *Harriet* had been taken and ransomed, left her.

Sixteen days after her first capture (26th of October) she was met with by a British privateer, of *New-Providence*, who took possession of her as a recaptured vessel, put on board a prizemaster and crew, and ordered her to the port of *Nassau*. They endeavoured to reach that place, but, being prevented by bad weather and contrary winds, proceeded to *Charleston*, and arrived here on the 19th November last.

The only question for the court to decide is, whether, under the circumstances of this case, the actors are entitled to any, and what, salvage.

It is contended on the part of the owners, that, if the vessel had been carried into a British port, no salvage would have been allowed, because she had been previously ransomed, and the ransom bill not recovered.

The argument appeared, at first, to have weight; but, upon looking into cases partly resembling this, and considering the nature of the ransom bill produced in the cause, I think the inference will not hold.

The ransom bill in this case expresses that two thousand dollars shall be paid *upon the arrival of the brig at the Havanna*. But the recapture prevented her arrival there; of course, the obligation became void: and, though they had the captain as a hostage, yet no suit could have been maintained on that bill, in any civilized country; because the event in which alone the payment was expressed to be due, never took place. What prevented it? The recapture by the British privateer. This saved the ransom to the owners. And the French captor seems to have been of that opinion, for the hostage was discharged, and the ransom bill with him.

R

It

1798. It was contended that, if the brig had arrived at the Benj: Moodie *Havanna*, she would have been restored, on the ground Brig Harriet of having been taken within the jurisdictional limits of the island. This might have been the case; but the consideration, I believe, would not have availed, if she had been carried into a British port. They would have in that event, considered nothing more than the original capture by their enemy, and subsequent recapture by their subjects. And if this court should go into an investigation of the point relied on, it would involve the question of prize, or no prize.

But it is laid down in *Douglas* 627. that though the contract of ransom happen to be connected, in point of time, with the capture as prize, it does not necessarily arise out of it, but is, in truth, a mere simple contract of sale between individuals, who at the time, and for the purpose, of contract are not considered as being the subjects of hostile nations: on which principle was decided the case, in 3 *Burrows*, of *Record and Bettingham*. There, though war still subsisted, and though the hostage had died in captivity, the action was maintained by an alien enemy against a subject of *Great Britain*; and this decree, lord *Mansfield* says, was notorious over all *Europe*.

But though this be law where the ransom bill is *not* recaptured, yet the case in *Douglas*, resting chiefly upon the authority of *Valin*, and other foreign writers, proves clearly that the recapture of the ransom bill puts an end to the claim of the first captor. In the case before me, the vessel, on the safe arrival of which at the *Havanna*, the ransom bill was due, has been recaptured. This is certainly equivalent to a recapture of the bill itself, and clearly extinguishes the claim of the original captors. So far the recaptors are entitled to salvage.

The remaining part of the question is what the amount of that salvage shall be.

From

From several decrees of British admiralty courts 1798.
 during the present contest, I find that one eighth has Benj. Moodie
 been a usual allowance to captors. In the case of the ^{v.} Brig Harriet.
 money taken out of the *Grand Sachem*, the admiralty
 court at *Antigua* decreed restitution to the original
 owners, upon proof of property; and reserved an eighth
 for salvage to the recaptors. This proportion is also
 observed by the court of admiralty in *England*, as ap-
 pears from *Douglas* 624.

Upon the strength of these authorities, which seem
 to me fully applicable to the case before me, I decree
 to the recaptors one eighth, amounting to two hun-
 dred and fifty dollars, with costs of suit.

Boreal v. Golden Rose.

FROM the evidence in this case it appears that the Captain of a
ship *Golden Rose* is a foreign vessel chartered by vessel not
Tunno & Cox, merchants of this place; where the permitted to
owners of the ship have also a correspondent. hypothecate
her for mo- ney taken

That the captain, a foreigner, has been supplied by up in a for-
 the actor with various articles, and some money, eign port, if
 amounting together to about one hundred and fifty his owners
 dollars. have a re-

That the captain has been supplied, by Tunno & presentative
Cox, with money at different times, to the amount of or corre-
about four hundred dollars. That these gentlemen had spondent
never refused payment of his orders, except in the there, who
present and one other instance, in both which the or- will advance
ders did not appear to them to be for the use of the what is ne-
ship. cessary; or

It was proved that they even offered to discharge if the same
 the present demand by a note at sixty days. This was may be pro-
 refused, and the present suit brought. cured by
other means.

The

1798. The question before me is of considerable importance to commerce in general; it must be decided, therefore, on general principles, and according to the course of the civil law. All the cases quoted upon this occasion were determined in courts of common law, but upon the principles of the civil law.

They lay down this position, which is unquestionably correct: that a person who supplies a vessel with necessaries has a triple remedy, 1st, against the owners; 2d, against the vessel; 3d, against the captain. Such person has the security of the ship by *lien*, if she continues in his possession; and by hypothecation duly made, whether she is in his possession, or not.

His security against the owners exists only in the port where they reside; and suit must be in the courts of common law, not of admiralty.

The captain is personally liable, if he has made himself so by an act of his own. While he remains in the port where his owners reside, and before commencement of the voyage, he must be proceeded against at common law. In foreign ports he may be sued there, or in the admiralty, by suit *in personam*.

In the present case, I am to inquire whether the vessel has been so hypothecated by deed or implication, as to make her liable.

The power vested in a master to impawn his owner's ship or goods for necessaries furnished in a foreign port, is a legal indulgence founded on the urgency of the case, and intended for the general benefit of commerce. "There are few rules of law," says a late writer on the subject, "more strictly defined than this; and none in which the reason and intention of the law are more manifest." The books are full and consistent upon this point of necessity. "Where money," says lord *Raymond*, "is borrowed on a ship before the voyage is begun, she is not answerable in the admiralty." (1 *Raym.* 578. 2 *Raym.* 982.) The law means

means to favour the completion, not the commencement of a voyage. 1798.

Boreal

Before the voyage is begun, and in ports where the owners reside, the necessity in question cannot exist. In foreign ports, great distress might arise from circumstances of invincible necessity, and the want of personal credit; of these alone will courts of admiralty take notice; otherwise, the power of the master to take up money might be ruinous to his owners, without promoting the general interests of commerce. In *Magens* 329, a case is reported of a suit in the admiralty on a bottomry bond, which concludes with this important remark. "Persons in seaports may learn "from this case not to believe, or trust too easily, a "captain whom they do not know; and, when they "are applied to for money on bottomry, under cover "of distress, they ought to see that the distress really "exists, and that the money is duly applied to the "purposes alleged."

In the case before me, the vessel is in a foreign port, but the owners have a correspondent here, the ship is under charter, and the captain has been supplied by the chartering merchants with money for necessaries, whenever he applied. The actor here may complain of hardship in losing his remedy against the ship, having already lost that against the captain, who is gone away. But courts of justice must proceed upon general principles. In declaring the law upon this occasion, I am not only supported by the foregoing decisions, but by a case determined by my predecessor here and by four cases reported by judge *Hopkinson*, (see his Rep. 163. & seq.) from the most important of which there was an appeal to the court of last resort; where his decree was affirmed for the reason laid down in page 170 of his Reports. The law, therefore, must be considered as fixed.

I decree that the vessel is not liable for this demand, and that this suit be dismissed. *Five*

1799.
January.

Seamen absent from a ship, without any fault of their own are nevertheless entitled to full wages.

Five Seamen of the Fair American v. Fair American and Captain.

IT appeared in evidence that these seamen shipped on board this vessel on the 3d of *September* last, in the port of *Philadelphia*, to go from thence to the *Havanna* and back. They all received a month's wages in advance. On the 8th of *October*, they were captured by a French privateer: these men were taken on board, and the captain and two other of the crew left in the prize. The latter, after some time, recovered possession of the *Fair American*, and brought her into *Charleston*.

The five seamen were put on board an American vessel, and arrived here in *December* last. They immediately went to their ship, and have been there ever since, in the regular performance of their duty, as part of the original crew. The voyage having been defeated by the capture, the cargo has been landed here, and the vessel is taking in freight for another voyage.

The question is whether these men are entitled to wages for the time they were absent from the vessel.

It is contended that as this vessel was taken before she arrived at her first port of delivery, the seamen lose their wages. *Lex Merc.* 100. On the other hand the same book has been quoted to shew that, if a ship be taken, retaken, restored, and afterwards proceed on her voyage, the contract is not determined, and the entire freight becomes due: that wages follow freight, and are also due.

This is the first case of the kind which I have been called upon to decide, and I have considered it fully.

It will not be contended that these seamen are to blame. They were taken from their ship by superior force,

force, returned to it as soon as they could, and have discharged their duty faithfully since. *Molloy* says, page 246, "that, if a vessel perishes, or is prevented by an enemy from returning, wages are lost; but if *'she unlades, they are due.'*" No such loss has occurred here.

1799.
Seamen
v.
Fair Ameri-
can.

The marine laws of the *Hanse Towns* declare that if a mariner fall sick and be left on shore, he shall receive his wages as if he had served out the entire voyage: and this appears just, for he was not in fault. Yet in such a case, additional expense is generally incurred by the hire of a substitute. Here, there was none, for all the duty was done by that part of the original crew that was left on board.

In *Hopkinson's Rep.* 60. it is decided that seamen of an armed vessel, who were on shore by the *captain's order*, should, nevertheless, receive a full share of prize-money, though they were on shore when the prize was made; because they were not in fault. The case was fully argued, and the decision confirmed on appeal.

That decision seems to conclude the case before me.

I am of opinion, however, that as the first voyage was defeated, these seamen are bound to continue with the vessel till the one now in contemplation be ended; and at the same rate of wages.

Let them, therefore, receive two thirds of what is due to them; and let the remainder be paid at the next port of delivery.

Cowell

1799.

March.

Agreement,
made in dis-
tress at sea,
void. Sal-
vage due,
and quantum
fixed by
court.

Cowell v. The Brothers.

THE brig *Brothers*, on her passage from *Lisbon to Baltimore*, had encountered a succession of dreadful tempests from the 12th to the 30th of *December* last, when she became a mere wreck, and was prevented with difficulty from foundering. For more than three weeks after this, the crew suffered all that human nature could endure; their provisions were expended, they had subsisted for nine days upon the flesh of a cat, and had actually salted one of the crew, who died of hunger and fatigue, as the only remaining means of preserving themselves from famine. Two of the crew had been washed overboard.

In this situation, *Cowell* fell in with them, sent them a supply of biscuit, and requested them to quit their vessel, and come on board his; offering to convey them to port without any expense. The captain of the *Brothers*, however, prevailed on him, after some time, to take the vessel in tow, stipulating that, upon her arrival in port, *Cowell* should receive one half of the value of ship and cargo, as a compensation. This agreement was reduced to writing, signed by the captains, and witnessed by their mates. From this time to the 8th of *February*, *Cowell* supplied them with provisions and water. On the 6th the cable, by which the *Brothers* was towed, gave way, but was again fastened. But on the 8th it parted a second time, and the sea ran too high to allow of its being any more got on board the wreck. Indeed, it was proved that in so boisterous a night no vessels could keep together. These, therefore, separated, and did not again see each other. They were now in soundings, and within ninety miles of land.

The brig continued to drift for nine days longer, when

when she fell in with a vessel from *New-York*, who informed the captain that he was close in with *Bull's bay*. He cast anchor, and continued in that state for ^{v.} *The Brothers*. four days, when he was piloted into the bay by a coaster. Here the brig received some repairs, and on the 4th of *March*, arrived in this harbour.

Captain *Cowell* has very properly relinquished the written agreement, and applies to this court for such compensation as his services may appear to deserve.

On the other hand, the respondent who, by his claim and answer, at first endeavoured to set aside the agreement as void in law, and resisted all compensation for conduct which he called inhuman, has, by his counsel, acknowledged the right to salvage, and submits the amount to the decision of the proper tribunal.

There cannot be a doubt that *Cowell* was an instrument, in the hands of providence, of saving this vessel from destruction. From the 12th of *December* to the 27th of *January*, they had not seen a single sail. From thence to the 8th of *February*, *Cowell's* vessel, by which they were assisted and taken in tow, was the only one they saw. It is evident, therefore, that they must have perished, for they had been seven days without provisions when he met with them, and could not have subsisted thirteen days longer. Salvage being thus evidently due, I shall proceed to consider the quantum. As to the agreement, it is wholly void at law, as having been made under circumstances of distress.

The service rendered upon this occasion was as great as the *crew could receive*; nor is it at all probable that the *vessel* would have been saved by any other means. *Cowell* too risqued much in the attempt; for his ship was actually injured, and the delay of towing rendered him additionally exposed to capture, and to the forfeiture of his insurance.

He failed indeed in bringing the brig into port; but not till he had done all that was possible. He brought her

S into

1799.

Cowell

1799. *into soundings, within ninety miles of land; and the supplies she received from him enabled her crew to sustain the fatigue of nine subsequent days, after the separation.* Upon their arrival in this port, they had plenty of wine on board, and some of the beef, with which *Cowell* had supplied them.

*Cowell
v.
The Brothers.*

This brig and cargo have been valued by appraisers duly appointed at 8,900 dollars. From this sum various deductions must be made for duties, &c. leaving a balance of 4,855 dollars, as net proceeds of the vessel and cargo. One fourth of this balance is 1,213 dollars without the fractions. From this deduct 295 dollars for supplies furnished by the *New-York* captain at the entrance of *Bull's bay*, and for the amount due to the pilot; the remaining sum of 918 dollars I decree as salvage to captain *Cowell*. I also order that he be paid for the articles he supplied at sea, according to the rate at which they may be replaced here.

Let the claimant pay the costs of suit.

Schutz

*Schutz et al. v. Ship Nancy.*1799.
March.

THE *Nancy*, on her passage from *Martinique* to *St. Kitt's*, sprung a leak, which being considerable, and one of the pumps being rendered useless, the crew agreed to stand for the first port. Four days after this, they threw overboard part of the cargo; in ten days more, made the land, and sent on shore for a pilot. The next day, the ship struck on a bank off *Cape Romain*, and at four in the evening fell in with a Danish ship, the mate of which was sent on board to ascertain her situation. The Danish captain also boarded her, and agreed, at the request of the captain of the *Nancy*, to stay by her that night, and, on the following day, to put his chief mate on board, who should take the command of the vessel and conduct her into port. It was further agreed between the two captains that, for these services, the Danish captain should receive such a sum as arbitrators might allow. The pump of the *Nancy* was repaired by the captain and crew of the other vessel; and she was towed by them till three o'clock the next day, when a pilot boarded her. The Danes then cast the ship off, and she was brought safely over the bar of *Charleston*.

The court, in this case, said that salvage was unquestionably due, but must be *reasonable*; and that agreements entered into at sea, by persons in distress, were void in law: as in cases of *duress* on land. This was done in the case of *Cowell* and the brig *Brothers*, decided here. The judge also compared the circumstances of the *Nancy* with those of the *Canada*, and *L'Esperanza*, which had also been argued here; and after a full view of the case ordered that the sum of one thousand dollars should be allowed to the libelants by way of compensation.

United

IN THE CIRCUIT COURT.

1799.

May 10.

A mark with
ink, acknow-
ledged by
the maker of
a deed to be the seal which was in the following form
his seal is suf-
ficient to cre-
ate a special-
ty, though
no wax, wa-
fer, or other
the obligor to be his seal.

similar sub-
stance be
used.

United States v. Ebenezer Coffin.

(L.S.)

THIS was an action of debt on a customhouse bond. An exception was taken to the validity of the mark with ink, acknowledged by the maker of a deed to be the seal which was in the following form (L.S.). No wax or wafer had been used; but the bond had been duly *delivered*, and that mark acknowledged by the obligor to be his seal. It was contended for the defendant that as the ground of action was an obligation declared to be under the hand and seal of the party, and as the *profert* did not support this, debt would not lie, and the plaintiff ought to be nonsuited. That the action of debt must be founded on a specialty, to create which a seal was necessary. That the court would take as the seal of the party any substance on which an impression might be made; but that none such existed here. That if the *reason* of the law requiring a seal had ceased, the *mode*, perhaps, ought also to be done away; but that the power of dispensing with it rested with the legislature, and not with the judges, who must take the law as they find it. 2 *Comyns*, 635, 637. *Espinasse*, 96. *Coke Lit.* 35, 36, 37. *Dyer* 13.

Ellsworth, chief justice, delivered the opinion of the court that the seal in this form, having been acknowledged by the party to be his, was sufficient.

Objection overruled.

British

British Consul v. John L. Thompson et al.

1799.
May 31.

THE brig *Abigail*, commanded by defendant, *Thompson*, and bound from the *Havanna* to *Cambay*, was captured on the high seas on the 28th ^{An American brig was captured by three British privateers, and sent to Nassau. One of the privateers previously put on board of her sundry valuable goods, to be carried to Nassau. The brig was returned by her own people, and brought in here. British captain libelled for his goods; but it being proved that there was no ground for capture, the brig recovered damages for injury done to the same.} *April* last by three British privateers, on suspicion of having enemies' property on board, and ordered to *Nassau*. Two prizemasters and six men were put on board the brig; and the master, owner, and one seaman remained in her. The other six of her crew were distributed among the three privateers.

Before they parted, *Miller*, who commanded one of the privateers, sent on board the *Abigail* various articles of merchandize, to a considerable amount, to be carried to *Nassau*. On the 2d *May*, the master, owner, and seaman of the *Abigail* recovered possession of her, and on the 8th brought her into this port.

The libel charges that the said goods are the property of said *Miller*, and other British subjects, and that restitution of them to the libellant, on behalf of the owners, has been refused: He, therefore, prays that this court will decree restitution, with costs and damages for injury done to the same.

Thompson admits that a quantity of goods were put on board and brought into this port, but disclaims all right to the same. *Hamilton*, the part owner, on behalf of himself and the other owners, also admits the putting on board of goods to a large amount, and his seizure of them; and prays that they may be condemned and sold to make compensation for the injury and damage sustained by the owners of the brig in consequence of her being unjustly seized and detained, and her voyage defeated.

The libellants insist that by 17th article of the treaty between the *United States* and *Great Britain*, the privateers

1799. Vateers had a right to detain the *Abigail* on suspicion British consul of having on board the property of enemies; and to Thompson et send her into the nearest British port for adjudication.

That this court cannot go into a discussion of the question whether these grounds were just or not, as that leads to the question of prize or not, determinable solely in the courts of the captors.

That if the party has sustained damage, he should have applied to those tribunals; but that by the recapture they have relinquished their right to do so.

That the claimant has admitted *Miller's* property in the goods, and that they made no part of the cargo of the brig when captured; of course he has no right to them, and they must be restored. That the trading from one Spanish port to another was *prima facie* evidence, sufficient to justify the seizure and detention.

For the claimant it was contended that where the court has jurisdiction in part, all incidental matters must be noticed. That the libellants have sought the aid of the court for restitution of this property, which leads to a full investigation of the business, and decision as to its consequences. That this was done in the cases of the *Grand Sathem* and *L'Esperanza*, as well as in some others; and that the doctrine, establishing the right of the court to do so, is confirmed in the case of *Le Caux* and *Eden*.

That the 17th article of the treaty with Great Britain does not give a right of seizure without reasonable cause of suspicion. That this article was intended to restrict the right previously existing under the law of nations. That upon perusal of the ship's papers, the captors ought to have dismissed the vessel, and would have done so, but that they wished to send these goods to *Nassau*, without delaying their cruise; and to divide the seamen belonging to the *Abigail* among the privateers.

Several cases were produced on both sides; but as they

they have no relation to any existing treaty, they do 1799.
not apply here.

British consul.
Thompson et
al.

The first point for my consideration is the authority of this court to retain this cause. Here is no contract expressed or implied between the person who put these goods on board of the *Abigail*, and the claimant. No freight is stipulated for, nor bill of lading signed. Nevertheless, it cannot be said that *Hamilton's* possession is either tortious or fraudulent. He was divested of his vessel and cargo by force, recovered them in the same way, and found these goods on board.

As the transaction took place on the high seas, I must either retain the cause, or leave the party without remedy. On the other hand, if I take cognizance of the matter upon the principle of law that "where there is right there must be remedy," I can only do so on the pleadings and evidence before the court, which necessarily involve the question of prize. This difficulty occurred in the cases of the *Grand Sachem*, and *L'Esperanza*, the first of which went up to the supreme court, where the jurisdiction of this court, under the circumstances, was confirmed; though the right of search, and detention for adjudication under treaty (with *France*) was admitted. From the papers on board the *Grand Sachem*, and from evidence produced to the court, I decreed the seizure illegal, and gave damages for the consequent loss of vessel and cargo. In the case of *L'Esperanza*, the cargo alone was in question; that being fully proved to be American was restored to the owners, in conformity to the provisions of the treaty. In neither case could the courts of the captors have interfered, because the parties were never within their jurisdiction; and this is the case now. The parties are compelled to ask for relief here; but the court cannot give it partially. It must determine on the whole merits, or not at all.

"He that seeks equity, must do equity." The li-
bellant

1799. bellant asks restitution of his goods. The claimant British consul pleads a right to retain them for compensation of damage unjustly sustained. To shew that there was nothing on board liable to seizure, he produces his register, bills of lading, and manifest; and the libellant has not attempted to deny the validity of these papers, or the neutral character of the vessel and her cargo. It is in proof, also, that the defendant has suffered greatly by the seizure and detention of the brig; and he is certainly entitled to compensation.

The case in *Hopkinson's Reports*, 95. is in many respects applicable to the present; and was affirmed on appeal.

The only point remaining relates to the quantum of damages, and in fixing these I have, as in former instances, been assisted by the opinion of three respectable merchants. Their report, a copy of which I have directed to be filed, states that 12,133 dollars 56 cents is a reasonable allowance to be made to the owners of the *Abigail* for the seizure and detention of their vessel. I decree, therefore, that so much of the goods belonging to the British captain be sold as will pay that sum, with costs of suit. And that the remainder be delivered to the libellant for the use of those entitled thereto.

Statement of loss sustained by the owners of the *Lina*, in consequence of her being captured. THE undersigned merchants of *Charleston*, who were requested, by the district judge for *South Carolina*, to ascertain what damages may have resulted to brig *Abigail*, the owners of the brig *Abigail* in consequence of her voyage being frustrated by capture, declare that, in our opinion, the said owners ought to be paid the amount following, viz.

Freight

District Court of South Carolina.

145

Freight of said brig of 180 tons burthen, as per register,	Dollars	1799.
Detention from time of capture, say 28th <i>April</i> , to 1st <i>June</i> , 83 days, at forty dol- lars per day, customary <i>West India</i> demur- rage,	5400.00	British consul Thompson et al.
Duties on 20 pipes of brandy, and 40 pieces of cambric, in consequence of their being relanded in <i>America</i> ,	1320.00	
Pilotage in and out, notarial papers, custom- house, and counsel fees,	721.00	
Loss resulting from disappointment in not returning with a cargo of logwood from <i>Campeachy</i> , at least	172.56	
Insurance of brig <i>Abigail</i> from home to <i>Phi-</i> <i>ladelphia</i> , and wages of officers and crew,	4000.00	
	520.00	
	<hr/>	<hr/>
	Dollars	12,133.56
	<hr/>	<hr/>

Signed

*Nathaniel Russel,
Adam Gilchrist,
John Geyer.*

T

1799.

June 10th.

Probable cause on oath must be set forth to justify the court in holding defendant to special bail, under act of congress of 26th February 1795.

Leonard v. Caskin.

THE order for bail was grounded on the third section of an act of congress passed 26th *February* 1795, which enacts, that "in all suits or prosecutions for the recovery of pecuniary penalties prescribed by the laws of the *United States*, the persons shall be held to special bail, subject to the rules and regulations which prevail in civil suits, in which special bail is required;" and on the twenty-fourth section of the circuit court law of this state passed in 1769, by which it is provided that "no person shall be held to bail for debt, unless duly attested, &c.; nor for any other cause without a judge's order on probable cause of action shewn, to be indorsed on or annexed to the writ, &c."

The only question is whether the affidavit now produced shews sufficient probable cause. Bail not being generally required, in *England*, on penal statutes, no case from the English books seems to apply here, except that from 3 *Bur.* 1569, where a forfeiture was sued for under the 26 *Geo. II.* c. 21. which expressly authorizes special bail. It was objected that the defendant's offence was not sufficiently specified in the affidavit of the plaintiff, who merely swore that he had cause of action against defendant for 200*l.* forfeited by him for having a quantity of unsealed silk in his possession. It was contended that this was making the plaintiff a judge of the offence, &c. But the court held that the affidavit was sufficient; and added, that the act required no affidavit at all.

In the present case it is contended that the affidavit on which this order is grounded is only the opinion and belief of a customhouse officer as to several communications which are set forth; and the only fact sworn

sworn to is, that the collector here has received a letter from the collector of *Georgia*, containing one from the collector of *New York*, which gives the substance of captain *Leonard's* information against this defendant. It is said further, that this information is not on oath, and, if it were, contains no ground of forfeiture or penalty. That the letters amount to nothing more than verbal declarations not sworn to; and that there is no instance of a court's ordering special bail to be taken, without affidavit of *facts*. On the other side it was alleged by the district attorney, that the affidavit he had procured was the best he could procure. That the words "probable cause," if they mean any thing, mean more than is admitted on the other side; and that if this construction be admitted, the clause is nugatory, as few suits can be commenced under other than the present circumstances. That the communications in this case authorize bail as fully as an oath merely on appearances; and that prosecutions of this sort will be defeated unless bail is required. The argument *ab inconvenienti* was much relied upon on both sides; but I cannot see that it avails here. The only matter for my consideration is, whether the affidavit sets forth *probable cause*. In the case from *Burrow* the plaintiff swore positively that defendant had forfeited 200*l.* In this case, there is no positive evidence, on oath or otherwise, that this penalty is incurred. Captain *Leonard* only says that he boarded this vessel at sea, that she had on board ten slaves, and was going from *Martinique* to the *Havanna*.

This might give cause for suspicion, but no more. The act of congress declares that the persons on board must be taken and transported with intent and purpose to *sell them as slaves*. The bare transportation of negroes from one place to another without proof of an intention to sell, will not incur this penalty. If the *intention* had been sufficiently made out, I should have thought

1799.

Leonard
v.
Caskin.

1799. thought the circumstances amounted to probable cause, and should have continued the order for bail, but as all the matters stated may be facts, and yet not amount to forfeiture, or incur penalty, I direct that the order be rescinded, and the defendant admitted to file common bail.

September.

Wages not always forfeited by dis-obedience of a captain's orders, unattended by aggravating circumstances.

THE only question in this case is, whether the actor has forfeited his wages, as mate of the *Ranger*, by misbehaviour on board.

The articles are in the usual form. The logbook has been produced, and a number of witnesses examined to shew that *Drysdale*, on the 4th of August last, behaved to captain *Booth* in so improper a manner as to work a forfeiture of the wages he now sues for.

It appeared from this evidence that *Drysdale* was first mate, and had the watch on deck. That a short time before his watch expired, the captain came on deck, and gave some order to the man at the helm, which the mate contradicted; asserting that the watch was his, and that he had the direction of the vessel. A dispute soon after arose as to the hour of the day, respecting which there was a difference of three minutes. This trifling circumstance led to all the subsequent consequences. *Drysdale* went so far as to call the captain a fool; and said he knew his own duty. The captain complained of this as being insolent, and ordered the mate to go below. He refused to obey till the time of his watch on deck should expire. Captain *Booth* then struck him, and ordered the second mate to tie him; which, however, was not done. He was struck

struck again, and then went below; making no further resistance, but calling on the carpenter and gunner to stop the captain from beating him, for that the captain was mad.

1796.

Drysdale
v.
Schooner
Ranger et al.

It was contended on the part of the claimant that, by the articles, these wages are forfeit. And 2dly, that exclusively of any contract in writing, an obligation is imposed on seamen to obey orders; and that their refusal to do so causes a forfeiture of wages.

The articles stipulate that the seamen shall not, on any account, leave or desert the vessel, till the voyage be ended and the vessel discharged. The act of congress has a similar provision. The articles also stipulate that the crew shall do their duty as becomes good and faithful seamen. But neither the contract nor the act says that disobedience of orders shall work a forfeiture of wages.

We must recur, therefore, to the marine law. The laws of *Oleron* declare, "that if a mariner commit a fault and do not submit, the master may, at the next place of landing, discharge him; and, if he refuse to go on shore, he shall lose half his wages, and all his goods in the vessel. But if the mariner submit, and the master will not receive his submission, he shall have his whole wages."

By the same laws, if a mariner commit a wilful or negligent fault, to the damage of ship or goods, the mariner shall be liable. In all cases of barratry, a partial or total forfeiture of wages, as the case may be, is the constant practice of the court.

The case reported in *Lex Mercatoria* from 15 *Viner* 284, is, that if a mariner, who has been rebellious, repent in time, and offer amends, he may, in case the master refuse, follow the ship and obtain his hire.

It is clear, therefore, that disobedience is not necessarily attended by forfeiture of wages. Let us, then, examine the particular circumstances upon which the court is now to decide.

The

1799.

Drysdale
Schooner
Ranger et al.

The cause of dispute was, at first, trifling, and the behaviour of the mate highly improper. It was his duty to yield implicit and ready submission to the captain's orders; by not doing so, he subjected himself to confinement and correction. He did, indeed, receive two blows; to which he made no resistance; and the captain would have been justified in further moderately punishing him. He chose rather to send him out of the ship, and refused to take him back; and he seems to have considered this as punishment enough, for he afterwards promised, in presence of the captain of the *Penelope*, to pay the mate his wages upon their arrival in *Charleston*. Whatever were his motives for not receiving *Drysdale* again into his vessel, I am willing to suppose them proper; but he ought certainly to make good his promise as to the wages, especially as the mate had ample revenge in his power, if he had chosen to give information to the British frigate of the tearing out of some of the leaves of the logbook. This he refused to do; and this, added to the proof before the court of his contrition, certainly extenuates his offence.

It appeared also, that no other instance of this sort had occurred throughout the voyage; and I am unwilling to construe the articles so strictly as to decree a forfeiture for this single fault. The circumstances were not so aggravated as they frequently are on this rough and dangerous element. If, indeed, resistance had been made, and this man's hand lifted against his captain, I should have decreed a forfeiture of wages without hesitation.

As the seaman's life is a hard one, and as the actor did his duty faithfully for a long time, with this only exception, I shall order and adjudge that his wages be paid. But as the motive of the claimant in withholding them was a due regard to discipline, and his duty to his owners, I decree that each party pay his own costs.

Stephen

Stephen Miller v. Snow Rebecca.

1799.

THE owner of this vessel being, as the bond itself sets forth, in want of money to fit her out, to pay wages in advance, and repairs necessary to her going to sea, borrowed three hundred dollars from *Miller*, the master, and duly executed this deed under hand and seal. To do away its validity, a paper has been produced signed by *Miller*, acknowledging the receipt of a bottomry bond for three hundred dollars in full for two months of his own wages in advance; and of one month's wages, also in advance, of the mate, four seamen, and a boy. It is contended that this money was never paid. But the bond states other purposes and wants, and it has been proved that *Miller* paid the following sums expressly within the letter of the contract.

For disbursements,	dollars 188.00
Butcher's bill,	46.00
Ship carpenter for repairs,	10.18
His own wages amounted to	66.64
Total,	310.82

The owner of this vessel pledged her to raise money for repairing pairs, wages, &c. Part of the wages were not proved to have been paid; but advances, specified in the bond as necessary were made beyond the amount of the bottomry bond. Court retained the suit, and ordered payment from sale of the vessel.

Admitting, then, that the other wages mentioned in the bond are still due, yet more has been expended on account of this vessel than is secured by the deed in question. There has been no fraud or collusion, the lien is just and legal, and as no other court can do complete justice by a proceeding *in rem*, I am of opinion that this suit must be retained and the vessel considered as liable for the amount of this bond.

This case was assimilated to *Hopkinson*, 163.; but there, the bond was given to persons who never advanced a shilling for the vessel's use. The consignees of the ship, who could not take a bottomry bond payable

1799. able to themselves, procured one to be made to a third person, who could not have any legal lien, inasmuch as he had incurred no risque. On account of this collusion, that suit was dismissed.

1800.
February 28.

Cross v. Brig Dolphin.

In case of re-capture by a public vessel of war, the salvage can only be ascertained by sale of the re-captured property: unless both parties consent to an appraisement. In this case salvage was decreed, and a sale of the vessel ordered. Claimant's counsel requested the court to direct an appraisement instead of a sale. The judge said that he had carefully examined the different acts of congress relative to captures and recaptures, and that they made an evident distinction between captures by a *private* vessel, and those of a *public* vessel of war, as was the present case. In the former instance, the court might direct the prize to be delivered over to the captors, or to be sold. In the latter, there is no discretion; the vessel taken must be sold.

These distinctions, he said, were applicable to the question of salvage, and must guide him on this occasion; he should, therefore, adhere to the original decree, unless both parties would agree that appraisement should be substituted for sale. In such case, he did not doubt the power of the court to concur; and would order a sale of such parts of the cargo as might be sufficient to pay expenses and salvage.

Accordingly, the following order was made.

"The agents for the recaptors, and also the agent for the owners of the brig *Dolphin*, having, in open court, consented to fix the valuation of said brig and her cargo by appraisement, in order to ascertain the amount of one eighth part for salvage, ordered
"and

" and decreed that A, B, C, D, &c. or any three 1800.
" of them, be appraisers for the above purpose; and Cross
" that they make a return of the value of said brig and Brig Dolphin.
" her cargo, on oath, under their hands and seals, into
" the office of the registrar of this court, within ten
" days. That the marshal sell at public auction, after
" the usual notice, such part of the cargo of said brig
" as will amount to one eighth of the value thereof,
" to be paid for salvage, free of deduction; together
" with all costs and expenses of this suit, and all other
" charges incident to the sale.

" That the marshal pay said amount of one eighth
" part to the agents for the officers and crew of the
" frigate *John Adams*; and after payment of costs and
" expenses, that he restore the said brig and the re-
" mainder of her cargo to the agent of the owners."

Thomas

U

1800.
June.

Thomas Hunter v. Brig Hannah, Owner, and Master.

Compensation due for
money surrendered to
prevent the capture or
burning of a
vessel and her cargo.

THIS suit is instituted by *Thomas Hunter*, to recover the sum of 950 dollars shipped on board the *Hannah*, and for which a bill of lading was signed at *Tortola*, on the 7th of *May* last, by *Killeran*, the master. The bill of lading specifies that the said 950 dollars were shipped by *John Collins*, and consigned to the actor in this cause.

From the pleadings and evidence it appears that; on the 17th of *May* last, the *Hannah* was captured by a French privateer, who took on board the captain and crew of the brig, and put her under the charge of a prizemaster. That the captors, after examining the cargo, were particularly anxious to discover if there was money on board. During the search, the prizemaster, who was very busy in it, caused several articles to be taken from the brig, and put into the boat alongside. Some time elapsed before money was discovered; and at length, as appears from the testimony of Mr. *Collins*, a conversation took place between the prizemaster and *Collins*, in which the former consented to give up the brig upon receiving a bill for one thousand dollars, made payable in a neutral port. But when it was found that there was money on board, the Frenchman, in a violent passion, reopened all the trunks, ripped up part of the ceiling, and threatened to burn the brig and make prisoners of her crew, unless they discovered where this money was concealed.

This is partly confirmed by the evidence of *Blake*, who says, the men were ordered on board the privateer, and had their clothes with them. The mate, too, says that all the men were taken out.

After some time, the captain of the privateer went on board the prize, carrying with him *Killeran*, her captain.

captain. That he found there fuel prepared in the cabin by the French sailors, who said they would set fire to the brig, unless the money was given up. 1800.
Hunter
v.
Brig Hannah.

This induced *Killeran* to deliver it to the prize-master, who returned the articles that had been put into the boat, and suffered the vessel to proceed on her voyage.

Much time was taken up in an endeavour to ascertain to whom the money belonged; whether to *Hunter* or *Collins*. It was also suggested that a leaf of the log-book containing the original entries had been torn out, and other entries substituted. As to the first point, the bill of lading is, in my opinion, conclusive; and the evidence of the mate satisfies me respecting the other. No higher evidence could be offered under the respective circumstances.

The only question necessary for investigation is, whether the delivery of this money was the inducement with the captors to discharge the brig, and permit her to proceed on her voyage: and whether, if the money had not been produced, they would have burnt their prize, or carried her into port. It was admitted on both sides, that whenever the sacrifice of part of a cargo produces the safety of the remainder, and of the vessel, contribution must be made by the property saved, as a just compensation for what is lost.

How does this law apply to the circumstances of this case?

There has been great contrariety of evidence, and it has been well set forth by the advocates on both sides. It will be necessary for me to state such facts as appear to me to have been proved, and I must draw my inferences accordingly. It is in proof

1st. That 950 dollars were shipped on board this brig, at a freight of one per cent.

2d. That the brig was captured on the high seas by a French privateer, by which, according to their present

1800. sent mode of proceeding, she might have been carried into port and condemned.

Hunter v. Brig Hannah. 3d. That the vessel and cargo were worth upwards of nine thousand dollars, exclusively of this specie.

4th. That, upon producing this specie, the captured vessel was suffered to proceed on her voyage.

I cannot, therefore, doubt that the money occasioned the safety of the vessel, and of the remainder of the cargo.

Whether they would have burnt the brig may be questioned; but they certainly would have carried her into port; and when once there, it is not probable they would have given up the whole, except the money.

In the present case, the captain discovered and delivered up the money so anxiously sought for. He declares, in his answer, that when he returned on board his vessel, from the privateer, he found the Frenchmen prepared with fuel in the cabin, to burn the brig. In consequence of their threats he discovered, and gave up the specie; and this in presence of *Collins*, the shipper.

Collins swears that he and the captain had previously conversed together, and that he acquiesced in the surrender of the money, because the captain promised the reimbursement of it as soon as they should arrive in *Charleston*.

All this appears probable and natural. Captain *Kilkeran* does, indeed, afterwards declare that he gave up the money as the property of *Collins*, and not as a ransom of the vessel and cargo. I do not see that this ought to avail. He had no *right* to deliver a part of his cargo, for which he had signed a bill of lading, except for the purpose of saving the remainder. He does not pretend that *Collins* consented to his doing so; nor is it probable that *Collins* would have acquiesced upon any other than the terms he states, viz. reimbursement.

I have

I have carefully considered this case, and am decidedly of opinion that the libellant is entitled to compensation and reimbursement of the 950 dollars, delivered up by him, upon the stipulation set forth; I decree accordingly. 1800.
Hunter
V.
Brig. Banah.

Putnam v. Schooner Polly.

July.

THIS is a suit instituted on a deed of hypothecation given by *David Gifford*, master of the schooner *Polly* to the actor, *John Putnam*, for 500 dollars, and dated at *Kingston* in *Jamaica* on the 5th day of *May* last.

A claim has been interposed by *William Whitman*, as owner of the said schooner by virtue of a bill of sale from *I. I. Hildrup*, dated 20th *November* last, given to secure payment of money advanced for said *Hildrup*; and states that, if any such deed of hypothecation existed, it must have originated in fraud. Claimant therefore, prays that his claim may be established, and the libel dismissed.

It appears from the evidence produced in the cause, that the schooner *Polly* sailed from *Savanna* with a cargo of lumber, and arrived at *Kingston* in *Jamaica*, in *April* last. That the cargo was addressed to the house of *Davis and Co.* who sold the same; but refused to advance money to the captain, to enable him to return home, alleging that *Hildrup* had already drawn on them for more than the amount of the consignment. It appeared also that *Gifford*, thus situated, had applied several times to *Putnam*, the actor in this cause, to assist him with money, as he could not proceed to sea without

The lender of money on bottomry must inform himself whether the alleged necessity exists. If not, he loses his specific lien on the vessel.

1800.

Putnam

v.

Schooner
Polly.

without it. Several witnesses agree in this, and prove that *Putnam* consented to advance money, if he could obtain good security.

Two of the witnesses swear that they saw the paper, called a bottomry bond, brought by captain *Putnam* on board his vessel. One of them looked over it, and swears that this is the same.

It appears from the exhibits that *Putnam* had money in the hands of *Davis and Co.* to whom this vessel was addressed; and that they advanced different sums to *Gifford*, and charged *Putnam* with 500 dollars, so advanced. In their account against the schooner *Polly*, they also give credit for that sum, as borrowed of *Putnam* for the above purpose.

It appears from these papers that this charge is dated in the schooner's accounts on the 2d *May*; in *Putnam's* on the 5th. The deed of hypothecation is dated *May 5*. But captain *Gifford*, it is proved, was buried on the 1st of *May*; so that, according to these statements, the deed bears date four days after *Gifford's* death. It states that the advance was made to *Gifford* by and with the advice and consent of the officers and men of his vessel, which was completely repaired, and furnished with necessaries for the return voyage, to the amount of 500 dollars.

The seamen contradict this; say that the schooner received no repairs in *Jamaica*; and deny that they were ever consulted upon the subject.

In arguing the cause, it was contended, on the part of the claimant, that this deed was founded in fraud and collusion. That the master of a vessel cannot, in every case, impawn her. To this point *Viner* was quoted 14. 329.

That the deed, being fraudulent in part, must be considered altogether so. That *Whitman's* bill of sale was of a prior date, and that his lien must be preferred.

On

On the other side it was contended that *Putnam* actually advanced the money, by which he was to gain nothing. And that a mere miscalculation as to the sum ought not to vitiate the deed. That the deed was not fraudulent in its origin, and cannot become so by subsequent circumstances. Parol proof, it was said, could not be admitted to contradict it; but, the execution of it being acknowledged, it must have operation according to its tenor.

I have, in several former cases, declared what I conceive to be the marine law as to hypothecation; particularly in the case of *O'Hara and Co. v. Ship Mary.* (Sup. p.100.)

It is laid down in 3 *Mod.* 244, that the true grounds of a maritime hypothecation are necessity, and the want of personal credit. The reason of the civil law which allows the pawning of a ship on the high seas, or in foreign parts, seems to be plain, viz. that there may be circumstances of invincible necessity; and of this the court of admiralty shall judge. Otherwise, the master's power to borrow money, and pledge the ship for repayment, would be unlimited and ruinous. *Hopkinson's Reports*, 170. is full to this point, and that was a case on appeal.

In the present case, it appears that only part of the money advanced by *Putnam* was for the use of the vessel; that no consultation was ever had with the mariners. That *Putnam* gave an order for the sum in question without informing himself, as he was bound to do, whether it was necessary for the vessel, or not. No repairs were made in *Jamaica*. But as it appears that the captain had no personal credit, and could not put to sea without some advance, I am of opinion that, so far as this money answered that necessary purpose, it must be considered as a lien on the ship. It would be so, by an *implied* hypothecation, if no deed existed.

1800.

*Putnam
v.
Schooner
Polly.*

I see

1800. I see neither fraud, nor collusion, on *Putnam's* part; but, if he was not ignorant of what the marine law requires in these cases, he was extremely inattentive to it.

It appears by the exhibits that a great part of this sum of 500 dollars was expended for the charges of captain *Gifford's* sickness and funeral. The vessel cannot be made liable for this. *Davis and Co.* had no right to apply the money in this way; they must settle that with *Putnam*.

As to *Whitman's* claim under the bill of sale, it can have no weight; because his money was not advanced for this vessel; at least, not in a foreign port.

Upon the whole, I decree that captain *Putnam* be reimbursed such sums as he advanced to enable the captain of this schooner to proceed to sea; and no more.

Aertsen

Aertsen v. Ship Aurora and James Brady.

1800.

September.

THIS is a suit instituted for seamen's wages, and to obtain a discharge, on account of the captain's having ill treated them. The crew consisted of eleven persons, two of whom are cabin boys. The rest are joined in this application.

The question for me is whether these men have suffered such ill treatment as will justify me in ordering their discharge, and payment of their wages.

A master of a vessel is authorized by law to correct his seamen moderately. In this instance it has been proved that the captain, at different times during the voyage, struck three of the libellants with his fist; these were the boatswain, the cook, and a seaman named *Hanson*.

It seems that after being eleven weeks at sea, they were restricted to an allowance of water of a bottle per man; and this caused discontent. The boatswain, going at the head of the crew to demand more, was ordered off the quarter deck. On his refusing to comply, a scuffle ensued, and the captain struck him once or twice with his fist. For the same cause he struck *Hanson*, and threatened to shoot him, if he did not go away: he ordered his pistol to be brought up, but this was not done. The cook was also struck once by the captain, with his fist, for having unnecessarily consumed the wood.

There is evidence of the captain's having a pistol on deck twice; once, when he loaded it to shoot a dog that had bit him; and at another time to intimidate the crew: but in the last instance there is no proof that it was loaded. The captain, indeed, swears expressly that it was not; and his answer must be ad-

X

mitted

Seamen may be moderately corrected by the captain. This court will not interfere where they are bound by articles to submit all disputes to a home tribunal.

1800. mitted because there are not two witnesses to contradict it.

Aertsen v.
Ship Aurora. From this evidence, I do not see sufficient cause to entitle these three men to their discharge: 1st, because no unlawful weapon was used; 2dly, because there was provocation enough to justify blows with the fist. The rest of the crew have shewn no claim whatever to their discharge. It is true that the captain was frequently intoxicated during the voyage; but there is no proof of his having struck one of the others. It appears that their allowance of water was increased, and that they had their brandy daily.

This is the case of a neutral vessel, the crew of which are bound by their articles to return to *Hamburg*, before they are entitled to receive their wages; and the 12th of those articles stipulates that every thing *not* specified therein shall be regulated according to the marine law of *Hamburg* for regulating the conduct of officers and seamen aboard vessels belonging to that place.

Let the suit be dismissed with costs.

Sheaff

*Sheaff and Turner v. 70 hogsheads and 9 barrels of
Sugar.*1800.
October 24.

THIS is a suit instituted by libel in this court against 70 hhds. and 9 bbls. of sugar, part of the cargo of the brig *Betsey*, late the property of *Sheaff and Turner* of *Portsmouth* in the state of *New-Hampshire*. It appears from the pleadings and evidence in this cause, that the brig *Betsy* sailed from the island of *Trinidad*, then in possession of *Great Britain* on the 22d April 1798, bound to *Portsmouth*; on the 5th of May she was captured by the French privateer *Pluvoyer*, *Pierre Olonyer* master, belonging to, and commissioned at, *Cape François*, and carried into the *Havanna*. That previous to her arrival captain *Turner* of the brig *Betsey* had agreed with the Frenchman to give him 4000 dollars to restore the vessel and cargo; in consequence of which he was put in possession, and remained so for upwards of twenty-four hours; but, on some difficulties being raised by *St. Mary and Cuesta*, the merchants to whom he was recommended, and to whom he applied for the money, he was dispossessed of his vessel again, and though he offered the money soon after, yet was refused possession; the French captain telling him she was already sold.

It appears that Mr. *Cuesta*, immediately after he declined the advance of the money, offered the Frenchman 5000 dollars for vessel and cargo for a gentleman of *Charleston*, supposed to be Mr. *Price*, one of the claimants; this happened on or about the 3d of June 1798. It appears that some time after, the brig *Fanny*, captain *Ormond* went alongside the *Betsey*, and took out the seventy hogsheads and nine barrels of sugar which she landed in *Charleston* about the beginning of September

1800. *September* following; soon after which this suit was instituted.

Sheaff and
Turner
v.
Brig Betsey.

It appears from the exhibits that on the 16th *June* 1798, the American consul at the *Havanna*, obtained from *St. Mary and Cuesta* a guarantee for the legal condemnation of the brig and cargo, or security for a refund of the amount she sold for: and a certificate is also exhibited, signed by the said American consul on the 18th *October* following, and annexed to a true copy of the original condemnation at the *Cape*, dated the 29th *Messidor, an 6.* which answers to the — day of *July*, 1798. An invoice has also been produced to shew that these sugars were shipped at the *Havanna* for *Charleston* on the 6th *August*, subsequent to the condemnation.

In arguing this case, three questions have been made and a variety of reasoning and a number of authorities produced on both sides.

1st. Whether any right was transferred by the capture, without being carried *infra præsidia* of the nation to which the privateer belonged.

2d. Whether the condemnation at the *Cape* of the vessel in the *Havanna* was sufficient to transfer the property sold previous to such condemnation, and

3d. Whether this court can reverse the decision at the *Cape* and set it aside for irregularity.

As to the first point, it seems at this day to be the general practice of the law of nations, to require a sentence of condemnation to vest the property in the captors and divest the former owner of all right; it is unnecessary, therefore, to say more on this head.

There having been such sentence of condemnation, I will consider the second point, whether that sentence under all the circumstances is legal and binding. It was contended with great earnestness, that the purchase was made previous to condemnation, and that by a court at a *distance*, not having the subject matter under

under their immediate jurisdiction: and the case in sir ^{1800.} *William Scott's Reports*, 135 & seq. was much relied on. Almost the whole reasoning in that case turned on the legality of a sentence of condemnation in a neutral port, and therefore does not apply in the present case. The judge there declares the irregularity of proceedings where the body and substance of the thing is not in the country exercising the jurisdiction. He nevertheless admits the fact as to two cases of ships carried into foreign ports and condemned in the court of admiralty in *England*; but he does not pretend to say that the sentence was not binding, but endeavours to shew that the ports of *Lisbon* and *Leghorn*, into which those vessels were carried, have a peculiar and discriminate character, that to a certain degree assimilates them to British ports. If we consider the *relative situations of France and Spain* in the present war, and the practice that has prevailed, we find from the evidence that it is the usual mode of sending the papers of captured vessels from the *Havanna* to the *Cape* for condemnation, and that all the vessels and cargoes that have been carried in there have been sold under such sentences. That these papers are lodged with an *officer* at the *Havanna* called the receiver of the rights of the republic of *France*, and copies certified by him are transmitted to the *Cape*, on which the court there exercises jurisdiction. The inference then must naturally follow, that this *officer* is authorized by the *Spanish* as well as the *French government*, and the proceedings sanctioned by them. Indeed the guarantee taken by the American consul and stipulation entered into with him, is, in my opinion, conclusive evidence on this point; if so, the port of the *Havanna* has the same peculiar and discriminate character as to *France*, that sir *William Scott* states the ports of *Lisbon* and *Leghorn* to bear to *Great Britain*.

As to the sale to the claimants being made previously

*Sheaff and
Turner
v.
Brig Betsey.*

1806. ly to the condemnation, no positive proof is before the court to that point; the condemnation is in *July*, and the invoice of shipment dated 6th *August* following.
Sheaff and Turner v. Brig Betsey. The present claimants were not original vendees; but if they had been, *as this part of the transaction happened on land, I doubt the jurisdiction of this court to interfere; but it is very common for sales to be made before condemnation sub modo*, and the guarantee taken by the American consul appears to be in the nature of a deposit, *pendente lite*.

As to the third and last point contended—whether this court can reverse the decision of the court of admiralty at the *Cape* so as to set it aside, I am decidedly of opinion it cannot. In the case quoted from *Douglas*, 559. lord *Mansfield* expressly lays down as a clear principle, that all the world are parties to a sentence of a court of admiralty, and that it is conclusive as to *that* which is within it, against all persons, unless reversed by the regular court of appeal. In that case, which was an insurance cause, *Buller* differed from the other judges, whose final decisions went entirely on the ambiguity of the sentence of the foreign court, so as to decide between the underwriters and the insured. In the present case, whatever irregularity there may be in other parts of the proceedings, there is no ambiguity as to the final sentence. The tribunal decrees the brig *Betsey*, captain *George Turner*, captured by the French privateer the *Pluvoyer*, captain *Olancier*, and carried into *Havanna*, a good prize, and this is certified by the American consul to be a true copy of the original condemnation.

On a serious review and consideration of this case, and the arguments on both sides, and after looking into all the cases quoted, I am of opinion *that this cause cannot be retained*, and I therefore decree that the libel be dismissed with costs.

This decree was affirmed, on appeal to the circuit court.

Pritchard

*Pritchard & Co. v. Schooner *Lady Horatia*.*

1800.

THIS is a suit instituted against the schooner *Lady Horatia* for work done, and materials found by them as shipwrights.

A plea, answer, and claim have been interposed by *Wood*, master of the schooner. As the plea goes to the jurisdiction of the court, and in bar to this suit, it is necessary to consider that in the first instance; because, if the plea is sustained, the suit must be dismissed without inquiry into the merits.

Much time was unnecessarily taken up, in the production of arguments, that had no relation to the point before the court. I did not interrupt these arguments; but I shall not notice any that do not apply to the material point; that is, whether the court can sustain this suit.

In support of the plea, it was contended, that this was a contract on land; and evidence was produced to prove it so.

It was admitted, that this was a foreign vessel, and that her owners resided abroad; but it was proved that the consignee of the owners resided here, who had funds of the owners, arising from the sale of this cargo; that the captain, therefore, had no power to make any contract binding either on the owners or the vessel.

That the contract for repairs was made with the consignee, and not with the captain; and that the former alone is liable. The law laid down in *Hopkinson's Rep.* from 179 to 190, was quoted; and the cases there referred to were relied on to shew that the plea to the jurisdiction must avail here.

The advocates for the libellant contended that the shipwright had a lien on the vessel, and on the captain, and on them alone. That this was one of those cases of necessity

The contract
for repairs
being made
on land, and
the owners
being repre-
sented on
the spot by
a consignee
who has
funds, a plea
to the juris-
diction of
the court of
admiralty
must avail.

1800, necessity that give jurisdiction to the court. That admitting the consignees to have monies belonging to the owners, they were not compellable to pay the present demand.

Pritchard
Lady Hornia.

That the shipwrights might elect whom they would credit, and make their charge accordingly. That they had done so, and chose to look to the vessel and captain, without reference to the consignee, whom they did not consider as liable, inasmuch as they had not bound him by a written agreement.

Three cases, decided in this court, were produced and relied on, viz. *North & Vesey v. Brig Eagle*, *Williams v. Brig Polly*, *O'Hara v. Ship Mary*.

It was further contended that a lien was, in this case, established, and that, whenever this appears, the court will aid. That the lien is mutually beneficial to owner as well as shipwright. That the vessel is in the nature of a pledge; and that the shipwright may retain her, till his bill is paid. Many cases were produced to these points, two of which *Danvers* 270, and *Cro. c.* 296. were much relied on.

In considering these cases, I shall first notice those formerly determined here.

In *North and Vesey* it was stipulated, previously to their furnishing supplies, that the vessel only should be resorted to. None of the owners were known; and when it was afterwards discovered that there were thirty six of them, they all consented, except one, that the sale should take place, and applied to this court for its aid.

In *Williams v. the Polly*, the shipwright had the vessel in his custody; the owner was dead; and if the administrator had got possession of the vessel, the property must have been distributed according to the statute.

statute: A failure of justice would have been the consequence; to prevent which this court interfered.

1800.

Pritchard

v.

Lady Horatio.

The case of *O'Hara v. the Mary* is also distinguishable from this; for there, the party who, in *Jamaica*, had advanced money for necessary supplies, not only had a lien and an implied hypothecation, but would actually have libelled or attached the vessel in *Jamaica*, if the captain had not drawn a bill for the amount, and expressly engaged to make the vessel liable therefor.

In reply to the other cases, I shall be satisfied with referring to *Hopkinson*, 100.; to the case of *Shrewsbury v. Two Friends*, before my predecessor Judge *Drayton*, and to that of the *Golden Rose*, before me.

The law laid down in these, must govern the present case. Commerce would, indeed, receive a deadly blow, if it should be established that the consignee is not to be looked upon as in the place of the owners. As to the question of lien, it is not now before me. All I shall decide, therefore, is that, this being a transaction on land; the vessel not being on a voyage, but unladen and the cargo sold; and the owners being represented, on the spot, by their consignee, who has in hand ample funds arising from the sale of this cargo; no such invincible necessity exists, as the laws of all commercial nations seem to require, in order to vest a jurisdiction in the court of admiralty.

I do, therefore, adjudge and decree that the plea is relevant, and that the bill be dismissed with costs.

Y

Stephens

1800.

Stephens et al. v. Bales of Cotton and other goods saved from the wreck of the Argus.

Vessel wrecked on Charleston bar; her cargo of cotton, &c. cast ashore on the adjoining islands, and there secured by great labour, much risque and that great labour and exertion were necessary, first of health, and some of life, of the salvors. One third of the cotton, and one half of the other articles given as salvage. A schooner lost in transporting these articles to Charleston, after they had been placed in a state of safety.

THREE suits have been instituted in this court against the articles saved from the ship *Argus*, lately wrecked on *Charleston* bar. The goods were cast ashore on several islands contiguous thereto. Restitution is prayed, after such deduction for salvage as this court may think reasonable.

It appears that the weather was rather tempestuous, to place these goods in a state of safety, and then to bring them to *Charleston*. All this was done by the salvors alone, without any assistance from the ship's crew. It appears also that, without great diligence, much of the cotton would have been washed off from the shore to which it had drifted, and would have been again afloat at sea.

The owners of all these islands, and their negroes, were constantly employed for a considerable time, (in some instances for three weeks) in securing, and drying this cotton; after which, it was carted with great labour to distant landing places, from whence it was finally brought to *Charleston*.

During the whole of this time, the crops of those who were employed in rendering this service were neglected; and at this season must have suffered much by grass.

The different salvors are upon nearly the same footing. But Mr. *Taylor*, who lost a schooner, valued at 250*l.* employed in bringing part of this cotton from a landing to *Charleston*, has libelled for salvage upon that ground. I shall decide upon that point hereafter.

The act of the legislature of this state passed 16th *March* 1783, has been produced to shew that goods, circumstanced

circumstanced as these were, shall be restored upon 1800.
payment of reasonable salvage. This brought forward Stevens et al. v. Ship Argus.
the question of jurisdiction. The point, indeed, was waived by counsel, but I think it my duty to notice it; for, "consent will not give jurisdiction."

This state act was passed previously to the establishment of this court under the federal constitution, and the subsequent act of congress, which gives the district court *exclusive* cognizance of all civil causes of admiralty and maritime jurisdiction. Such are all matters relative to wreck; and it is settled that incidental circumstances, necessarily flowing from and dependent upon the first cause of action, shall follow the original jurisdiction. In cases of concurrent jurisdiction, either court may decide; so that, in every point of view, I am bound to adjudge this case, without any undue interference with the act of the state, above mentioned.

Both this act and the law of nations entitle the salvors to compensation in this case. (*Marten's Law of Nations* 167.)

The material consideration regards the quantum of salvage. The service rendered, the risque attending it, and the value of the property saved, are the points by which the decree in this, and every similar case, must be regulated.

Here, the service rendered was considerable. It is proved that the ship's crew abandoned the property; and the captain, who remained for some time on one of the islands, did not assist in any manner. Mr. *Mair*, by the newspapers and by handbills made known the situation of the vessel, and offered all due encouragement to such as would endeavour to save the cargo; yet no more than 35 bales of cotton, and 15 barrels of tar were saved by these, or any exertions, except those of the salvors, parties to this suit. They, unassisted but by their own negroes, saved

1800. 264 bags of cotton, 334 barrels¹ of tar, and a quantity
 Stevens et al. of logwood, fustick, and mahogany, which sold for
 ship Argus. 600 dollars.

The risque these persons ran was not, I think, so imminent as was contended. They exposed their health, indeed; and Mr. *Lawton* and his son were actually made ill by their exertions.

Several respectable witnesses are of opinion that the salvors ran some risque of their lives in saving the cotton; and declare that they themselves would not have encountered the same, for the whole value of what was saved. The parties, however, seem to have dreaded sickness more than any thing else; and they might reasonably do so, for their labour must have been extreme.

As to the third point, the value of what was saved; the sales amount to 12,199 dollars, chiefly arising from the cotton. The tar, &c. produced 1,178 dollars; but these articles of inferior value, occasioned much more labour to the salvors, than the cotton.

Upon the whole, I think the libellants are entitled to receive, as a compensation for their very meritorious exertions in this case, one third of the net proceeds arising from the sale of the cotton, and one half the proceeds of the other articles: and I decree accordingly.

With respect to the charge contained in the libel, filed by Mr. *Taylor*, I cannot, on any principle, admit it. His schooner was not lost while employed in saving the goods; but in conveying them, after they had been placed in safety, to the agent of the owners. He is, therefore, upon a footing with the owners of other coasting, or river vessels, and, like them, entitled to freight, (but to nothing more) on delivery of their loading.

Samuel

Samuel Lindsey v. Owners of ship South Carolina.

1801.
October 27.

THE actor was one of the crew of the *South Carolina*, and with the rest had signed articles to proceed from *Charleston* to *Leghorn*, and back; with liberty to touch at *Gibraltar*. The vessel sailed from and there hence about the 1st *May* 1800, and put into *Malaga*, where the captain sold 200 bags of cocoa, part of his cargo, and received on board 23 casks of wine. The ship left *Malaga* on the 6th *July*; but on the 15th was taken by a British frigate, and ordered into *Port Mahon* for adjudication. On her way there, she was recaptured on the 25th by three Spanish, and one French, privateers, and carried into *Majorea*, where the ship and cargo were condemned. An appeal has been made to the supreme tribunal at *Madrid*; and the ship and cargo, by the last advices, remained in possession of the mate and cook, the captain being at *Madrid* for the purpose of prosecuting the appeal. The rest of the seamen left the vessel in *February* 1801, having first obtained a certificate from the mate that they were detained by the captain's order to that time.

The only question for my decision is, what wages are due to the actor.

This ship and cargo have been condemned at *Majorea*.

1st. As taken from the possession of an enemy; though this is directly contrary to the treaty between Spain and us.

It has been contended that the deviation to *Malaga* entitled this crew to their wages then due, and even to a discharge. But I do not consider this alteration of the original voyage as sufficient to induce these consequences, whatever might be the case as to an insurance. Besides, nothing of this sort was insisted on at the

1801. the proper time and place. I shall, indeed, decree wages up to that time, viz. from the 1st *May* to the 14th *July*, upon the ground of the captain's having sold part of his cargo at *Malaga*.

Lindsey
Ship South Carolina.

It has been said further that the condemnation of this vessel shall not affect the wages of the crew, because she was engaged in an illicit trade. But no such thing appears. The captain and owners are blameless. They knew nothing of the Spanish edict newly proclaimed, and in direct violation of our treaty with *Spain*, by which it is provided that our property, recaptured by them from an enemy, shall be restored upon payment of salvage.

The second ground of condemnation at *Majorca* was, that certain of the ship's papers had been thrown overboard. This must have been done, if done at all, by the British captors, for the captain had no inducement to conceal any thing relative to a voyage perfectly fair. If he had seen cause to do an act of this sort, it must have been when he was first taken, in which case the British commander would have been justified in using this as a plea for condemnation.

It is nevertheless true that the sentence of a court of competent jurisdiction in *Spain* will be binding upon these parties, and may ultimately destroy the right of these seamen to the balance of their wages after leaving *Malaga*. For this I can give no redress; but in consideration of all the circumstances of this case, and that the men never quitted the ship till they were dismissed by the captain, I decree that the actor receive an additional compensation of one month's wages, and that costs of suit be paid by the defendants.

Taylor

*Taylor and Deliessline v. 25,000 dollars saved from
Schooner Friendship.*

1801.
November.

IT appears in this cause that the schooner *Friendship*, from *Nassau*, bound to this port, was wrecked on the 7th instant, upon the *Rattlesnake* shoal, off *Deweese's Island*, two miles distant from any shore. The vessel beat a great way over the breakers, and the sea ran very high. They got the boat over the side, with a view to procure assistance from shore; but she broke away with one man in her, and could not return. One attempt to save themselves on a raft failed; they had determined to make a second, considering it as the last resource.

Two pilot boats appeared off, but found it impossible to give them assistance. From five o'clock in the morning, when the vessel struck, to four in the afternoon, the crew were in great danger, and much alarmed for their final safety. At that hour, they were overjoyed at the sight of a canoe and four hands, with which *Taylor and Deliessline* had come to their assistance. As soon as they got on board, the captain said he had money and was very desirous to save it. It was immediately put into the boat, and carried on shore, with the passengers and crew, except the captain, and one or two others.

The salvors went off a second time, with two boats, one of which could not venture to go alongside. The other effected it, at great risque; but saved nothing from the vessel, except some trunks and baggage.

It appeared that the seaman, who had drifted away in the schooner's boat, returned on the morning of the 9th, not having been able sooner to procure assistance. At this time it was high water, and the sea rough; the vessel

1801. vessel had bilged, and the waves were breaking over her.

Taylor and
Deliessline

Soh'r. Friend-
ship.

It was fully proved that these unfortunate persons were treated by Mr. *Deliessline* and captain *Taylor* with the greatest kindness. It appeared that Mr. *Deliessline* has a large family, and is in narrow circumstances; and that the loss of him and of his negroes in this attempt would have been attended with very serious consequences.

The counsel for the actors insisted that under the circumstances of this case, the risque of the salvors, and the danger of the persons and property thus meritoriously saved would justify, and even called for a proportion not less than one third for salvage.

On the other side, the services were readily admitted, but it was contended that the danger to the salvors had been too strongly set forth.

In determining cases of salvage, I have uniformly proceeded on the following considerations.

1st. The service rendered.

2d. The risque of the party rendering this service.

3d. The value of the property saved by their means.

In the present case the service was great. The parties saved were in imminent danger, and had little chance of being otherwise relieved. Two pilot boats saw their distress, but would not venture to come near them; and the persons on *Long Island*, to which the schooner's boat had drifted, thought the danger so great, that they would not risque themselves, their negroes, or their boats. One raft had failed; their remaining hope, from a second, was very precarious; and all the people saved are ready to acknowledge that they must have perished without the assistance given by the actors.

As to the 2d point, it appears that the sea ran high, and that the persons in the boat did not board the schooner without danger. It was not indeed, so imminent,

minent, as one of the counsel endeavoured to make it appear.

1801.

Taylor and
Deliesline
v.
Sch'r Friend-
ship.

I shall not, however, detract from the merit of the parties. Their motives were generous and disinterested, and their assistance no less prompt than voluntary. Many others, in their situation, would have remained snugly on shore. It is true, that they consulted their feelings, and did not calculate their interests. This is their highest praise; and though it has been said, that their reward is laid up in heaven, I see no reason why they should not receive such as may be decreed to them on earth. *Deliesline's* risque was unquestionably great; for, if he had perished with his boat and negroes, his numerous family would have been exposed to severe distress.

As to the third point: the property saved consisted of no less a sum than 25,000 dollars. If these had not been received into the boat at the time they were, it is doubtful whether they could have been saved at all.

Molloj, (L. 2. c. 5. s. 4.) quotes the *Rhodian* law as fixing a fifth, or tenth, in cases like this, according to the case, or difficulty of effecting the salvage. He adds: "rich goods, as gold and silver, pay less than "goods of greater bulk, because they are in less danger." The observations on the laws of *Oleron*, quoted in page 125 of a treatise on the dominion of the sea, say that, according to those laws, divers and salvors should take one half, a third, or a tenth of the things saved, according to the depth of water, out of which they were recovered. In 1 *Rob.* 313. sir *William Scott*, in a case of salvage by a boat going to the relief of a distressed vessel, expresses his opinion, as to the rate of reward, in terms to which I entirely accede. (See the case.)

Upon a full review of the circumstances before me, and upon mature consideration of their applicability to

Z

the

1801. the principles I have laid down, and after inquiry as
 Taylor and
 Delinssine
 v
 Sch'r Friend-
 ship.

to what would have been the amount of premium upon
 the insurance of this property, I decree, that one fifth
 thereof be paid to these salvors; not only for compen-
 sation of their risque, their services, and their huma-
 nity, but also as an inducement to others to "go and
 do likewise." Let the costs of this suit be paid by the
 claimants out of the residue, after deducting this pro-
 portion for salvage.

British Consul v. 22 pipes, and 10 hogsheads of Wine.

Restitution,
 upon pay-
 ment of sal-
 vage, will be
 adjudged in
 all cases, if
 the original
 owners can
 be found.
 Salvage ne-
 ver should
 exceed more
 than one half
 of property
 saved.

FROM the pleadings and evidence in this case it appears that the brig *Anthonio*, *Ward*, master, on a voyage from *Oporto* to *Dublin*, encountered bad weather, and sprung a leak of so dangerous a kind, that, after consultation with the crew, it was agreed to stave the cargo. Five days after this, they agreed to bear away for the first land. On the day following, they fell in with the *Criterion*, *Smith*, master, bound from *Dublin* to *Charleston*. By him they were supplied with some provisions. It appears that as soon as *Smith*'s boat went alongside with these provisions, all the seamen of the *Anthonio* quitted her, to go on board the other vessel. This was prevented by *Smith* at *Ward's* request; and the men were immediately sent back. *Smith* then went, himself, on board the *Anthonio*, and offered to take her captain and all her crew into his ship, if they chose to leave the *Anthonio*. *Ward*, finding his seamen resolved to do so, was obliged to comply with this offer; his mate refused at first, but was at length induced to do as the rest did.

It

It appears that captain *Smith* then endeavoured to save what he could of the cargo; but the wine, and a hawser, mentioned in the libel, were the only articles that could be removed from the *Anthonio*. They were employed and detained two days in effecting this; after which they left the vessel, and proceeded to *Charleston*.

1801.
British consul
v.
Smith.

Restitution is prayed by the British consul, on behalf of the owners, on payment of a reasonable salvage.

Captain *Smith* by his claim and answer admits the facts stated in the libel, as to the situation of the vessel and crew; but says that he had no idea of attempting to save any part of the cargo, till the crew had finally abandoned the ship: and adds that he would not have engaged in that business at all, if he had not thought that he should be entitled to the *whole* of what he might save.

The pleadings are, in all material points, supported by the evidence. It was, indeed, insinuated that *Smith* had *induced* the seamen to quit the *Anthonio*; but there is no proof of this. On the contrary, it appears that, in one instance, he repelled them from boarding his vessel; and that he did not ultimately receive them till the captain and mate came also. They did so, it is true, unwillingly, and would certainly have remained with their ship, if the crew would have consented to remain.

It appeared from exhibits that the *Anthonio* and her cargo belonged to Messrs. *Myler*, sen. and jun. one of whom resides in *Dublin*, the other in *Oporto*.

In arguing the cause, the counsel for the libellant admitted that a reasonable salvage should be allowed. He quoted several cases heretofore determined in this court, and contended that under the circumstances of this case, one fourth would be fully sufficient for salvage.

On

1801. On the part of the claimant it was said that, this being a case of derelict, the whole must vest in the salvors, or finders. The right of the sovereign, in many countries, by municipal regulations, to property thus circumstanced, was conceded; but it was contended that no law of this nature exists in the *United States*, and, of course, the first finder is entitled. That the civil law gives no remedy to the original owner in cases of property derelict; and to this point was quoted 3 *Dallas*.

I have read that case with attention; but cannot find that it supports the inference now contended for. The district judge who fixed the rate of salvage lays it down that the law of nations, as to cases of this sort, had long been settled on principles consonant to justice and humanity, and favourable to the unfortunate proprietors. His decree was affirmed by the supreme court.

Sir William Scott's opinion in a case similar to this may be found in *Rob. Reports*, p. 41 to 45.

Vattel expresses himself strongly against claims of this sort. 1. 23. 293. I have determined several cases of a nature similar to this, and I have heard no argument upon the present occasion to shake my former opinions. I continue to think that there is no difference between *wreck* and *derelict*, except that the property is, in the one instance, found on land; in the other, at sea. In both, the original owners, if they can be found, have a paramount claim, upon payment of reasonable salvage. I shall consider upon this, as upon every similar occasion, the merit and risque of the salvors, and the value of the articles saved.

Here, the seamen of the *Anthonio* refused to remain on board of her. If the master and mate had persisted in doing so, alone, their lives and the whole of the cargo would, probably, have paid the forfeit. A material service, therefore, was rendered.

The

The labour, necessary to remove such parts of the cargo as were saved, seems to have been great; but the risque to the *Criterion* and her people was small, except on the score of insurance. She was detained two days only, and did not go out of her course. Some damage was done to the boats, and some to the stern of the vessel, which must be considered in fixing the salvage.

1801.
British consul
v.
Smith.

Whatever may be the value of the property saved, I do not, in any case, think myself authorized to give more than one half, by way of compensation of this sort. I shall abide by that proportion in the instance now before me; and I do accordingly order and decree that the marshal of the court pay over one half of the net proceeds of the property saved from the *Anthonio* to the claimant in this cause. And that he pay over the other half of said proceeds to the British consul, for the use of the original owners: stipulation being first made to refund the same, if no such appear within a year and day from this time.

Sullivan

1802.
March 23.

Sullivan et al. v. Nathaniel Ingraham.

It is a general rule that all the crew must contribute to make good the amount of articles of the cargo embezzled. But it is admitted that the wages sued for are due; but the defendant alleges that certain articles of the cargo to the value of nearly 200 dollars have been embezzled; and he contends that this sum should be deducted. The loss is admitted, but it is said that as the mate and steward, with three other seamen, were on board at the time it happened, they must contribute to make good the amount.

It appears that the vessel to which these men belonged put into *Cork* in distress, and that while she was under repair, a part of the cargo was put into a lighter alongside, and there secured as far as possible by lock and key. The only way in which these articles could be got at was through a scuttle of the forecastle where the men slept. It was also evident that the theft could not have taken place in the day-time, as the workmen, two customhouse officers, and the mate were constantly on board. A harbour watch of two seamen at a time, was constantly kept; but neither captain nor mate took part in it. Neither mate nor steward slept where the men did. They were aft, with the captain.

Three seamen were shipped at *Cork*, for the voyage. They worked on board for some time as labourers, and went ashore at night, till two or three nights before the vessel sailed, when they slept on board. The captain has paid off these men, without any deduction for the barratry now complained of.

The question is, who are to be answerable for it?

The general doctrine is that *all* are answerable, inasmuch as all in their turn have charge of the vessel, and must be presumed to assist, at least not to be ignorant of, a theft on board. In the case of the *Fanny, Ormond,*

Ormond, decided here, one hundred pieces of nankeen 1802. had been stolen, of which three were found in the chest Sullivan et al. v. N. Ingraham. of one of the seamen. His guilt was, of course, clearly established; but the court was of opinion that others must have been concerned, since no single man could have secreted so much without aid and connivance. Accordingly, all were decreed to contribute to make good the loss. In that case, however, the mate does not seem to have been implicated. The court upon these occasions will always endeavour to distinguish between the innocent and the guilty, and, to do this, will rely even upon presumptive proof, if it be sufficiently strong. No other offers here.

It appears that these goods must have been taken in the night; that the seamen alone kept the watch, and that the articles stolen could not have been got at, except through a scuttle in their birth. The mate and steward never slept in that part of the ship, and both of them are men of excellent character, as the captain swears, who is an impartial witness. The presumption in favour of these two is as strong as could be required.

It is otherwise as regards the three Irish seamen, for they slept on board two or three nights before the vessel sailed, and had their turn of watch duty. They are, therefore, liable for the actions of the others; for there is no proof offered that the goods were stolen before they slept on board.

I decree that all the men belonging to the vessel, except the mate and steward, contribute, *pro rata*, towards making up this loss; and that each party pay his own costs.

Joshua

1802.
March 23.

Joshua Sprague v. Alexander Kain.

Forfeiture of half a seaman's wages decreed, in consequence of his striking the captain. The latter had inflicted other punishment for the offence, which prevented the court from decreeing forfeiture of the whole. TIT appears in evidence in this cause, that the actor used insulting language to his captain, the defendant, who was thereby provoked to strike him with his open hand, or fist; it is not clear with which. Two of the witnesses swear that the captain also struck this man with a grange staff. Upon this the seaman seized a scrubbing brush, with which he struck the captain several blows over the head, and repeated them till he was stopped by two passengers and the mate. The captain's head was severely cut, and he was for some time senseless. When he recovered, he caused the man to be confined and afterwards sent to jail at the *Havanna*, where he remained three weeks; the vessel being then ready to sail, he was taken on board, and kept in confinement below, till his arrival here. He now sues for wages; and the question is, whether he is entitled to all or any part of them, after this violence exercised upon his captain.

This is the first case I have been called upon to decide, in which a seaman has been convicted of striking, or even attempting to strike his commanding officer; and the act of congress does not provide for such a one. I must, therefore, be guided by the marine law. It is agreed on all hands, that the master of a ship may give due and moderate correction to the mariners under his orders. In the present case the words of provocation were first given on the yard-arm, where, it seems, some liberty of speech is allowed; but it also appears that the words were repeated on deck; for, upon the captain's asking the actor whether the sail was properly furled, he answered: "it was done as well as the captain himself could have done it." This was

was certainly insolent language from one who is said not to be a good seaman; and a blow with the fist was, on such provocation, very moderate correction. His behaviour subjected him to a more severe punishment, and he does not seem to have shewn any marks of contrition. If, therefore, the master had turned him ashore at the *Havanna*, I should not have hesitated to decree a total forfeiture of his wages. But as the captain took the law into his own hands by imprisoning this man at the *Havanna*, and by a subsequent confinement of eight days, on board, I think the offence is, in some measure, done away. I decree, therefore, that he forfeit only one half of his wages, and that the remainder be paid by the captain. The parties must pay their own costs.

1802.

Sprague

v.
Kain.*Bouysson*

2 A

1802.

July 9.

Attachments
may issue
out of the
admiralty
courts of the
U. States,
against the
goods or
debts of an
absent per-
son, so as to
make him a
party to the
suit.

Bouysson and Holmes v. Miller and Ryley.

THE question before the court arises on a demur-
rer to the libel in this cause, which, though not
expressly a plea to the jurisdiction, is intended to
operate as such. The arguments of the counsel for the
defendants suppose that this court cannot issue attach-
ments against the property of absent debtors, so as to
make them parties to a suit in the admiralty. It is con-
tended that the court can proceed *in rem*, or *in perso-*
nam, but that an *attachment* against property is a dif-
ferent proceeding, and cannot issue from hence. Or,
admitting that it could, can operate only against pro-
perty on the high seas, or within the flux and reflux of
the sea; as laid down in *Clarke's Praxis*, sec. 24.

It was also contended that if this doctrine be admit-
ted, third persons may be deprived of their property
without a trial by jury. That when courts of common
law have jurisdiction, this court has none. That as the
court is not one of record, it must always shew its
authority. That of the two clauses (24th and 28th)
quoted from *Clarke*, the one is positive and the other
not so; and that unless they are so construed as to be
reconciled with each other, the authority is ambiguous.

On the other side it was said, that by the laws of the
United States (vol. ii. 139) the proceedings in every
admiralty cause must be according to the course of
the civil law.

That *Clarke's Praxis* is of the highest authori-
ty to shew what is the practice of courts of admiralty,
as appears from 1 *Atk.* 296., 3 *Durn. and East*, 338.,
and 3 *Black.* 108. That the practice as to attach-
ments against the property of absent debtors, was pe-
culiar to civil law courts, and has been adopted from
thence,

thence, in some instances, by the courts of common law. And that when this court has original jurisdiction, it will extend it to all collateral matters.

This is a new question, and makes it necessary that the jurisdiction of this court as to matters civil and maritime should be investigated.

By the 9th section of the judiciary law of congress, it is declared that district courts, in addition to other powers therein mentioned, (and by subsequent acts, extended) shall have exclusive original cognizance of all *civil* causes of admiralty and maritime jurisdiction. Hence it acts both as an instance and prize court, and its authority to do so was settled by the supreme court of the *United States*, in *Glass's* case (See *Dallas's Reports.*) In *England*, the court of admiralty, as court of prize, proceeds *in rem*; as an instance court, both *in rem* and *personam*. As both jurisdictions are united here, we must next inquire how they are to be exercised.

The act of congress; 8th May 1792, declares that the proceedings in cases of admiralty and maritime jurisdiction, shall be according to the principles, rules, and usages of courts of admiralty, as contradistinguished from courts of common law. *Clarke's Praxis* has hitherto been looked upon as the best book of its kind, and has been resorted to as of uncontroverted authority. The authorities already quoted recognize it as such. By the 24th section of this book we are told, that the contents of the preceding chapters must be understood of defendants *personally* arrested in a civil cause. But, "if he is out of the kingdom or so abroad that he cannot be arrested, then if he has any goods, wares, ship, or parts of a ship or vessel upon the sea, or within the flux and reflux of the sea, a warrant is to be taken out to these effects."

The 28th clause goes further. "Sometimes the person to whom you have lent money, or who is indebted

1802.
Bouyeson and
Holmes

Miller and
Riley.

1802. " debted to you upon some *maritime contract*, cannot
 Beuysson and " be met with, to be arrested, or has no goods that the
 Holmes
 v.
 Miller and " marshal can come at, but you know where and in
 Ryley. " whose possession your debtor's goods are, or at least
 " some person that owes your debtor money; in that
 " case, you may sue out a warrant to the effect of the
 " one specified in the 24th chapter."

The English practice of admiralty courts is clear from these sections, in the cases therein stated. Courts of admiralty in this country are recently established, and furnish few precedents; but such as we have are conformable to the practice as laid down by *Clarke*.

As this is a suit for seamen's wages, it must be admitted that it relates to a contract of a maritime nature. This court, therefore, has jurisdiction of the original matter, and no less of what is merely incidental. *Hopk.* 140. I am of opinion, therefore, that the proceeding by attachment is agreeable to the rules and usage of admiralty courts. If the actors cannot proceed in this way, they lose all remedy whatever may be their right of action. To attach a debt works no greater injury, as it appears to me, than the attaching of goods; the party is not thereby deprived of any advantage which he could claim if personally arrested, the attachment operating only to bring him before the court. The principal question, being of admiralty jurisdiction, must be tried in this court, and in case of a decision against him, his attached goods or debts stand in the place of his person, unless he appears and redeems them.

As to depriving third persons of a trial by jury, it may be observed, that if the property of such persons be attached, they may appear, and, upon proper proof, may have it restored. I see nothing in the case of *Delcol and Arnold* (3 Dall. 335) to controvert what

I have

I have laid down. The fourth point investigated there 1802.
was: "Whether the ship and her cargo could, before ^{Bouysson and}
^{Holmes}
"condemnation, be attached, and made liable in that
"suit to the captors;" and this strengthens the pre-^{v.}
sent decision, inasmuch as it implies that, *after con-*
demnation, such attachment would have been regular.
Besides, the general question of the power in this
court to issue attachments like the present was not
before them, nor does any thing in that report tend
to divest it of the jurisdiction it is called upon to
exercise against the present defendants.

I have fully considered the circumstances and ar-
guments brought before me, and am clearly of op-
inion, that attachments against the goods or debts
of absent persons may issue out of this court of ad-
miralty. Therefore, let the *demurrer* be overruled.

Bouysson.

1802.
August 13.*Bouysson and Holmes v. Miller and Ryley.*

Owners decreed to pay the usual monthly wages, upon proof of the voyage, and of the master's doing duty on board. The vessel was captured.

IN this case wages are claimed of the defendants, as owners of a vessel called the *William and Sarah*, which left this port in April 1802, bound, as is alleged, to the coast of Africa. The libel states that she was captured by a Spanish privateer, on the coast of South America, and sold.

No evidence is adduced either as to the extent of the voyage, the rate of wages, or time of their becoming due. *Holmes* claims from this port; *Bouysson* from Sierra Leone.

The cause of capture of the vessel is wholly in the dark. Several witnesses have been examined; their testimony amounts to this: that in the beginning of April 1800, *Holmes*, one of the actors, applied to one *Thomas Covenay* to be his security for his advance money, on board this vessel, in case he should not comply with his agreement to go the voyage. It seems that *Covenay* declined to do so.

M^r Lane proved that *Holmes* took some stores from his house in company with the captain of this schooner. He says the vessel was then about to sail for Cape de Verd. He did not see the things carried on board.

John Watson says that about two years ago he saw *Holmes*, as cook to captain *Harris*, come to his store, with the captain. He saw him several times carry things on board; and understood from *Harris* that he was going to the coast of Africa. *Gardner* says that he was at *Bance Island*, on that coast, and saw *Holmes* on board a schooner called the *William*, from *Charleston*. He was generally about the camboose. He had known *Holmes* in this port, and they were together about a fortnight at this island.

Morrison proves that, in the month of March last, *Holmes*

Holmes came on board his vessel at the *Havanna*, and asked for a passage to *Charleston*, which was given him. There is no further evidence respecting *Holmes*.

1802.
Bouysson and Holmes
v.
Miller and Ryley.

An affidavit has been produced on the part of *Bouysson*, which is inadmissible, first because he is a party concerned; and secondly, because he was present in court, and should have been examined *vivâ voce*, if at all. A case has been quoted from *Bay's Reports* 453, to shew that the affidavit of a party interested may be admitted as evidence.

But, two circumstances of that case are wanting here; for, the defendant there agreed expressly to be bound by the affidavit; and the person who made it was *absent*. No other testimony is offered to support *Bouysson's* demand, except that of *Henry Wessner*, who says he was at *Sierra Leone*, on the coast of *Africa*, from *May* to *July* 1800. That some time in *June* he heard the captain of this schooner tell *Bouysson's* landlady that if she would bring him her bill, he would pay it. That he saw *Bouysson* carry his clothes on board, and the landlady told him the captain had paid the money.

This suit has assumed different shapes. A libel was filed in *April* last against *Miller* and *Morrison*, as owners of this vessel, by the present actors. A plea was filed by *Morrison* on the 3d *May*, setting forth that he never had any interest in the vessel or cargo, either as owner, or otherwise; and, that *Miller* was absent from the state. Upon this, another suit by attachment against the property of *Miller* and *Ryley*, was instituted. To this, a demurrer was interposed, and, upon argument, overruled, and then the parties upon whom the attachment was served, filed their answer of the 7th instant.

These persons disclaim any knowledge of the actors, or of the matters stated in their libel, except from the information of the actors themselves. They believe *Miller* and *Ryley*, who are absent from the state,

1802. to be owners of this schooner. It is admitted that *Bouysson and Holmes v. Miller and Ryley.* one of the defendants, is agent for *Miller and Ryley.* Stipulations have been entered into according to the practice of the court, that if a decree be given against the absent parties, these defendants will be answerable to the amount.

From the pleadings little can be inferred. None of the defendants are interested in the suit, except as garnishees. What they acknowledge is mere heresay, and not sufficient to affect the owners of the schooner. We are compelled therefore to have recourse to such proof in support of this libel, as has been already stated.

As to *Bouysson*, there is no evidence of a contract for wages, nor of any voyage by him performed. He was in a distant country, and must naturally have wished to return home.

What the amount paid to the landlady was we do not know, but it probably discharged any demand he was entitled to make. As to him, I must therefore dismiss the libel.

The testimony in favour of *Holmes* is much stronger. It is proved to my satisfaction that he acted as cook on board this vessel in the harbour of *Charleston*, and afterwards went in her, in the same capacity, to the coast of *Africa*. A determination similar to this took place two years ago, in the case of a vessel belonging to *Tunno and Price*, of this place, condemned at *Majorca*.

Let *Holmes*, therefore, receive his wages for two months, as it appears probable that he found security for a month's pay in advance, though *Covenay* declined to become so.

No rate of wages having been fixed, I decree that the defendants pay the same at thirty dollars per month, with costs of suit.

Cross

*Cross et al. v. Ship Bellona.*1803.
January.

THE ship *Bellona*, of New-York, sailed from Cadiz on the 2d September last, with a cargo of wine. She encountered several violent storms, in which she was dismasted, and had her rudder irons knocked off. In this state, with three feet water in the hold, she met at sea a schooner bound to Boston, from which they could obtain no supply of provisions, nor other assistance. But the master offered to take them into his schooner, and to land them in one of the ports to the eastward. The crew of the *Bellona* accepted the offer.

On the 7th November following, she was met with in latitude 42, 40, longitude 63, by the brig *John Sanders*, master, who put his mate, *Brown*, and two seamen into the *Bellona*, with a supply of provisions and other necessary articles. She had, at that time, three and a half feet water in her hold, her hatches were open, and her rudder irons gone. *Brown* and the two seamen continued their endeavours to make a port, till the 30th November, when the libellant *Cross* boarded the *Bellona* in latitude 32, 39, longitude 68. Her stock of provisions consisted then of no more than thirty weight of beef, and as much of bread. *Brown* agreed with *Cross* that, upon his staying by the wreck, and assisting to get her into port, he should receive one half of the ship and cargo. Upon these conditions, *Cross* remained with the *Bellona*, sent one seaman on board, and furnished her with all necessary supplies. He was with her when she arrived in this port, seventeen days after he fell in with her.

It was proved that *Sanders*, who put the first three men on board, took out thirty-six casks of wine, and carried them with him to *Salem*.

2 B

After

1803.

Cross et al. v. Ship Bellona. After arguing the merits of the respective salvors, a claim was interposed by the owners and underwriters resident in New-York. Counsel were heard also on their behalf.

Much ingenuity has been displayed as to the *proportional* service of the several salvors; but as they have agreed to divide equally whatever may be adjudged to them, I shall not rest upon that point.

It is said that they are entitled to two thirds of the vessel and cargo. But the owners, by their counsel, as strenuously maintain that they will be amply compensated by a fourth; or, at most, a third part. It was admitted that essential service had been rendered. It is, indeed, highly improbable that the vessel would have reached land without the assistance of *Sanders*, who found her derelict; and the subsequent aid of *Cross*, who supplied her with necessaries, and towed her into this harbour.

The value of the property saved is considerable.

Robinson's Reports, 1. 43., were quoted in favour of the salvors. Sir *William Scott* there says, that courts should not be desirous of reducing to one dead level, the various degrees of merit that must attend the circumstances of each particular case. He refers to a pretended universal rule of giving *one half* in every case. No more was contended for in that case; but, though no owners appeared, it was declared that the salvors were not entitled to a moiety, and it was determined accordingly.

The case quoted by the counsel for the owners from 3 Rob. 355. is also inapplicable to this. There the services were rendered on land, and the crew of the *William Beckford* were on board, and assisted in saving her. In the case before me, the vessel was abandoned on the high seas, was found six or seven hundred miles from any land, in a disabled state, and at a tempestuous time of the year.

I have

I have always considered cases of derelict as different from other claims for salvage, and have invariably decreed one half by way of compensation. Circumstances may induce me, on future occasions, to give less: I would not, therefore, be understood as laying this proportion down *universally*. But I cannot conceive that the owners ought by *any* considerations to be divested of more than a moiety.

I adjudge that proportion now; and decree that the salvors here receive one half of the amount of sales of the *Bellona* and cargo, after deducting the costs of this suit, and all other necessary charges.

The thirty-six pipes of wine taken out of the vessel by *Sanders* must be carried to account of the share of salvage to be divided between him, his mate, and two seamen. One equal part of the salvage money, (or fourth of the whole net proceeds) must be paid to captain *Cross* or his agent.

All these parties must settle their respective shares between themselves. The court has been pressed to do this for them; but I do not feel myself bound, or authorized to do so.

The remaining half of the net proceeds must be paid over to the agent for the owners and underwriters.

United

United States v. Sheriff of Charleston District.

1803.

March 23.

The revenue
laws of the U.
States give a
preference
over other
creditors in
several
cases; but
must not be
so construed
as to destroy
a prior legal
lien.

THE *United States* have obtained judgment and execution against the late collector of this port, for a debt incurred after the passing of the act of congress of 3d March 1797. (3d vol. *United States Laws*, 423.)

It appears that a citizen of this state has a *previous* lien by judgment and execution in the state court.

The sheriff has proceeded by virtue of that execution, to levy on the property so bound; and this suit is brought to stop the sale: to this a demurrer is filed.

The single question is, whether, under the 5th section of the above mentioned act of congress, the *United States* have a preference or not.

The cases in which that preference is established are

- 1st. Property in the hands of executors.
- 2d. Where assignments of property are made.
- 3d. In cases of attachment.
- 4th. In cases of bankruptcy.

The first act that contemplates any preference in favour of the *United States* was passed 4th August 1790.

The 45th section provides that in cases of insolvency, or where an estate in the hands of executors or administrators is insufficient to pay all the debts of the deceased, bonds to the *United States* for securing payment of duties shall be first satisfied.

The next law on the subject was passed 2d May 1792, and provides in section 18, that where sureties pay such bonds, they shall be entitled to the same preference that the *United States* would have had.

The

The act of 3d *March* 1797 provides that no voluntary assignment of his property by a debtor of the *United States*, nor any attachment of said property nor ^{United States v.} _{Sheriff of Charleston.} act of bankruptcy, shall prevent the *United States* from being first paid what may be due to them. The same provision is contained in the last revenue act, vol. 4, 387.

I cannot find that these acts do in any manner comprehend the present case. There is not a syllable in either of them that can be fairly construed to divest a prior legal lien. I am, therefore, of opinion, that this demurrer must be sustained, and the suit dismissed.

L'Arina

1803.
July.*L'Arina v. Brig Exchange.*

A person hired for a particular purpose as *nominal captain* is entitled to wages agreed upon with the *real captain*, and so far the vessel and owners are bound. But not for a further sum in case of discharge.

AT a summary hearing of this case, a plea to the jurisdiction of the court was urged, because the actor being master of the vessel could not sue in the admiralty or make her liable for his wages, his remedy being against the owners only.

It appeared in evidence that the actor was merely called master of the brig, but never was considered so, or acted as such, except by lending his name to clear the vessel at the *Havanna*.

An agreement was produced between him and *Manwaring*, the real captain, that he should receive fifty dollars per month, to proceed to *Charleston*, and return to the *Havanna*; unless he should be discharged, or the voyage should be altered: in either case he was to receive 200 dollars, over and above his wages.

In considering the case, the court decided that the actor never was captain in fact, and therefore not barred from suing here. That the agreement for monthly wages was binding on the owners; and the vessel liable, as far as that amount. That the words "*unless discharged*" gave *Manwaring* a clear right to discharge him; and that by doing so, *Manwaring* became personally liable, at common law, for the said sum of 200 dollars. That the owners were in no manner bound for the same.

The court adjudged accordingly, that the brig was liable to the amount agreed upon as monthly wages; *with costs*.

L'Arina

L'Arina v. Manwaring.

1803.
July.

THIS is a suit for the recovery of 200 dollars, un- An agree-
der an agreement entered into by defendant at
the Havanna on the 1st of May last.

The agreement consisted of two parts:

1st. To allow the actor monthly wages, at the rate of But another
50 dollars per month, and maintenance on board the stipulation in
brig Exchange, as well as on shore.

2d. That if the voyage should be changed, or the should be al-
captain should not return to the Havanna, then to pay voyage
the actor 200 dollars over and above his said monthly
pay.

Suit was brought against the brig about ten days ago, when the court determined that the vessel and owners were liable for the monthly wages agreed upon; and for no more. This decision could not impair the right of the actor against the captain, under the agreement. *Manwaring* was no party to that suit; and the jurisdiction of the court as to him was not considered.

It is now contended that captain *Manwaring* is liable in this court under this contract.

That the contract is entire and cannot be divided. That it must be maritime *in toto*, or the reverse.

This point has already been decided; for the former decree made the vessel liable for monthly wages, and dismissed the suit (as to her and the owners) for the remaining sum stipulated for in the agreement.

The next question is, whether *Manwaring* may be sued personally in this court on the latter part of his contract.

The law as laid down in *Hopkinson's Rep.* 140, "that where the original cause of action is exclusively of admiralty, or common law jurisdiction, all incidental matters

1803. "matters shall follow," is clear enough; but it can only apply to the parties in the original suit, and not to persons then out of the view of the court. Such is the case now. The former suit was brought by the actor against the vessel and owners. The *present* is between the same actor and the captain of the vessel, whose act was declared by the court not binding on the owners as to the sum of 200 dollars, over and above wages. That decree also declared that the question now under discussion was partly of admiralty, and partly of common law, jurisdiction; in which case the latter shall be preferred. Indeed, the petition in this case states that a suit at common law has been instituted; but that, the actor being a transient person, the defendant means to give bail, for the purpose of delay: which induces the application to this court.

It was contended that this court has jurisdiction, because, though the contract was on land, it contemplated a voyage performed, or *to be performed*. This will hold so far as relates to the payment of monthly wages, as well on board as on shore, and until the actor shall be discharged. But the stipulation to pay 200 dollars over and above these wages is, expressly, in case *no voyage* should be performed, or contemplated.

This is a strong distinction between the two parts of the agreement; the latter of which is a contract on land, and only cognizable by the court of common law.

Bills of lading, policies of insurance, and bottomry bonds, where the vessel is not hypothecated agreeably to the marine law, are all sueable at common law only. Yet these contracts are all more or less connected with a voyage. They give a title to sue the owners or master, but do not make the vessel liable; as she is in the case of seamen's wages.

I have considered the case fully, and have no hesitation

tation in saying that, if I should assume jurisdiction, 1803.
L'Arina
v.
Manwaring.
a prohibition would lie; and as there is no court where it could be immediately obtained, I shall at once decree that this suit be dismissed with costs.

Bass v. Five Negroes and a Canoe.

IT appears that these five negroes had been driven out to sea in a canoe, and that they were picked up by captain *Bass* in lat. 33, near the outward edge of the gulf stream, and about sixty leagues from land. They were destitute of provisions and water, and, according to the account given by the negroes, had been so for four days. Captain *Bass* went two or three miles out of his course to take them on board; and supplied them with provisions until he arrived with them in this port, fourteen days after he found them. There was no great risque in rendering this service; but it was very important in its effects, for, without it, these people would, probably, have perished. Their chance of meeting with vessels was small, and they could not have subsisted much longer without provisions and water. They were making, as they say, a *West-India* course, and could never have reached land without this, or some similar, assistance.

The canoe and negroes may be valued at three thousand dollars.

Every case of salvage must depend upon its own circumstances; but it is now agreed that courts ought always so to act as to afford encouragement to salvors in general. I have frequently, especially in cases of derelict, awarded one half of the property saved. At present,

1803. present, I shall be satisfied with decreeing one tenth.
 Captain Bass Let captain *Bass* be paid that sum; and let the owner
 Five Negroes. of the negroes pay the costs, as it appears that they
 stole the canoe, which is the property of another
 claimant, Mr. *M'Call.*

Executors of Spencer Mann, surv. v. Henry Maurice Sacks.

1804.

April 21.

False papers **T**HIS is a suit for damages. The defendant on the 25th of December last, captured on the high seas, divest a neutral vessel of all right to redress, under treaties, or the law of nations. and carried into the island of *Cuba*, the schooner *Ann*, with a cargo of slaves. *Sacks* at that time commanded a French national brig called *La Sophie*, and was duly commissioned to cruize. When he boarded and took possession of the *Ann*, she was under the command of one *Ogden*, who called himself a Danish subject, and was reputed owner, to cover the property which, in fact, belonged to *Mann and Foltz* of this town. The vessel was sailing under a Danish flag; her register, and all the papers on board were Danish; and when *Sacks* boarded, *Ogden* asked him if the French were at war with the Danes.

It was contended for the actors, that this court, as an instance court, may take cognizance of all maritime causes, and cases have been cited to this effect.

In all suits hitherto sustained by me, one or other of the following circumstances existed.

1st. The illegal equipment in our ports of the capturing vessel, contrary to act of congress of 5th June 1794.

2d. Disregard of sea-letters produced, as required by the treaty with *France*; as in *Delcol and Arnold.*

3d.

3d. Capture within a marine league of this coast. 1804.

It is true that the question of prize or no prize has ^{Ex's. of Mass} sometimes been implicated with matters that concern- ^v H. M. Sack-
ed the sovereignty of the *United States*, or a violation
of her treaties.

According to our present treaty with *France*, cer-
tain papers therein specified shall suffice to fix the na-
tional character of the vessels of both powers. If such
are produced without due effect, and if the captured
vessel be brought *infra præsidia* of her own courts,
those courts will, without hesitation, interfere. But if
American citizens will, for the sake of gain, divest
themselves of their neutral character, and send their
vessels to sea under foreign or masked papers, they
do so at their peril. They forfeit all right to the pro-
tection of this court and of the treaties intended for
the benefit of those who bring themselves fairly with-
in their provisions.

It appears clearly from a variety of evidence, in-
cluding two policies of insurance, that this vessel had
no claim to be considered as American. If the French
vessel of war had brought her into this port, the treaty
would have justified her in carrying her out again, as
a Danish bottom; nor can the captain be now made
answerable personally. He has pleaded to the juris-
diction of the court: he has a right to do so; and the
libel must be dismissed with costs.

J. F. Soult

1804.

May 28.

Jurisdiction
of district
courts of the
U. States as
certained by
act of con-
gress of 1794
to extend to

THIS suit is instituted on behalf of the French re-
public, by their agent of commercial relations, to
pray restitution of the corvette *L'Africaine*, her tackle,
furniture and apparel; and also compensation for da-
gness sustained by her detention.

a marine
league from
the coasts or
shores, ex-
tending to
low water
mark. Shoals
covered with
water are
not part of
the coast or
shore.

To the libel filed in this cause, a claim and plea are
interposed by *William Pindar*, commander of the brig
Garland, a British privateer, on behalf of himself and
crew, stating that this court ought not to have cogni-
zance of the several matters mentioned in the libel,
because they did not take place within the jurisdiction
of this court; the corvette having been captured on the
high and open seas, not within a marine league of any
coast or shore, of the state of *South Carolina*, or of any
coast or shore of the *United States*.

From the pleadings and evidence produced, it ap-
peared that the corvette *L'Africaine* had met with a
gale of wind at sea, on the 22d *April* last, in which
she lost her mizenmast, and sixteen of her crew; and
was obliged to throw overboard six of her guns and a
quantity of provisions. That, in this situation, she was
boarded on the evening of the 3d of *May*, off the bar of
Charleston, by a pilot, who brought her to anchor in six
fathoms water, her draught of water being too great to
permit his carrying her over the bar, until the next tide.
It was proved, that early the next morning, 4th *May*,
the brig *Garland*, with a ship in company, bore down
on the corvette as she lay at anchor; and that, on a
gun being fired from the privateer, the corvette struck
her colours, was taken into possession, and brought in
here, as stated in the libel.

The

The single question for the consideration of the 1804. court is, whether this capture was made within the J. F. Soulé waters of the United States, or within a marine league L'Africaine: of the coasts or shores thereof: it being within those limits only that this court can take cognizance of captures between belligerent powers.

In determining this point, it will be proper first to fix precisely the place where this vessel lay at anchor when she was captured, which, from the evidence of pilots, and a chart of the coast produced in court, was done with great accuracy. All the witnesses agree that the corvette was anchored in six fathoms water, on the outside of the *Rattlesnake* shoal; the nearest land to this shoal appears to be the south end of *Long Island*. From thence to the spot where the corvette lay at anchor, is, by measurement, nearly six miles. The *Rattlesnake* shoal, is, itself, four miles from land *at least*. Some of the witnesses say it is four and a half; others six or seven miles distant from land: and as this shoal lay between the corvette and the nearest land, the distance is ascertained with sufficient precision.

In the case quoted from *Robinson's Admiralty Reports*, sir *William Scott* remarks, that "an exact measurement cannot easily be obtained; but that, in cases of this nature, the court would not willingly act with unfavourable minuteness towards a neutral state, but will be disposed to calculate the distance liberally." On similar principles, I am also disposed to calculate liberally and impartially between the parties; which the position of the *Rattlesnake* shoal between the nearest land and the vessel enables me to do. As that is acknowledged on all hands to be four miles *at least*, the question of distance as to the marine league from shore is settled.

But it is contended by the counsel for the French republic, that the words *coasts* or *shores* being both found in the act of congress, the jurisdiction ought to extend

1804. extend beyond a marine league from the *shore*, and J. F. Soult ought to be measured from the *coast*, which includes L'Africaine. all the shoals thereon: and this ground was much insisted on.

It was also said that this capture was contrary to the law of nations, the laws of humanity, and the treaty with *France*.

Much time was occupied in reading a number of cases from the law of nations; and reference was made to the correspondence of Mr. *Jefferson*, when secretary of state, with Messrs. *Genet* and *Hammond*, the ministers, respectively, of *France* and *England*. It is only necessary for me to remark here, that this correspondence was prior to the 4th June 1794, when the law of congress was passed. As to the cases adduced, they shew that the line of jurisdiction has varied as the several nations referred to thought fit. I believe the *United States* are the only power who have fixed, by law, the limits of their maritime jurisdiction.

It was argued that this law of congress was passed on the spur of the occasion, and was intended only as an experiment. It may be so. But though the act was originally limited to two years, it was extended afterwards to four years; was finally revived without any limitation, and continues to be, at this day, the law of the land.

It is not for this court, exercising a jurisdiction of this nature, to take into consideration the laws of humanity. A vessel, however distressed, may lawfully be captured on the high seas; and the present question must be decided not by the law of humanity, but by the law of congress.

As to the treaty with *France*, I have examined it, and find that it does not at all relate to a case like the present. The 18th section does indeed mention "sailing along the coasts," but is, nevertheless, totally irrelevant to the question now before us.

But,

But, in order to prove that *coasts* and *shores* have a different meaning, reference is made to the 7th section of the act of 1794, where it is said: "and in every case ^{J. F. Soulé} _{L'Africaine.} ^{v.} of the capture of a ship or vessel within the jurisdiction or protection of the *United States*, as above defined," &c. and it is contended that in this clause the word "jurisdiction" relates to coasts, and the word "protection" to shores. In answer to this I would observe, that by recurrence to the 6th section, we shall find that "jurisdiction," as there defined, must relate to captures within the waters of the *United States*, about which there could be no dispute, and *protection* to the marine league. With this distinction the several clauses are perfectly reconcilable, which they could not, otherwise, be.

Two witnesses were produced to explain the meaning of the word *coast*, among mariners. They said the coast included all the *shoals*, stretching out to any distance whatever; and a critical inquiry was made into the distinction between the expressions "*off* the coasts" "and *on* the coasts." But the act by which we must be guided uses neither. It says, "*from* the coasts;" and this signification differs, in my opinion, from both the others. If the construction contended for should obtain, the marine league would vary with every shoal that could be found. At one time, it would be three miles from the shore or land; at another, ten or twenty miles, according to the extent of the shoal. It would be impossible to fix any boundary of jurisdiction; no two district courts of the *United States* could determine alike, because the shoals lying off the coast or shore of each would be found to differ in extent; in cases of appeal, the judges of the superior courts would be unnecessarily perplexed; and "the glorious uncertainty of the law" would be established indeed.

Much stress was laid on the vessel's having taken a pilot on board. Had the law of congress not defined the distance,

1804. distance, and the evidence fixed it so clearly, I should have been inclined, in a case of this sort, as I have already said, to reject unfavourable minuteness, and to give a liberal construction. A vessel that has taken a pilot near our shores, ought, *prima facie*, in my opinion, to be protected by our neutral jurisdiction. But, as I am bound by the law as I find it, and not by what it ought to be, I can only express a wish that it may be so amended by the legislature as to embrace, in future, every *bona fide* case of this sort.

This is said to be a new case, and one of great importance. I view it as such in both lights, and have, therefore, given it very mature consideration: and after a full investigation of the matter, with reference to consequences both as respects ourselves and foreign powers, I am of opinion that the words in the sixth section of the act of congress "a marine league from "the coasts or shores of the *United States*," must have been intended and must be construed to the land bordering on and washed by the sea, extending to low water mark.

I, therefore, adjudge and decree that the plea in bar filed in this cause is relevant, and that the libel must be dismissed. But, as it appears that the agent of commercial relations of the French republic considered himself bound, in his public capacity to prosecute this suit, I order that each party pay his own costs.

Gernon

Gernon et al. v. Cochran, Marshal of this Court.

1804.
August 9th.

CARVIN, owner of a French privateer, had captured this Spanish brig at a time when it was insisted, that no such capture could be legally made, peace having then taken place between France and Spain.

By recurrence to the proceedings of this court so far back as August 1796, it appeared that a suit was instituted by the Spanish consul against the *Ceres*; but, no libel having been filed, that suit was, upon motion, dismissed.

On the 30th of November following, the Spanish consul instituted another suit, and on the 14th of December following, before any other proceedings were had than a return of the warrant and proclamation for general of claim, the parties, by their proctors, obtained an order, founded on consent, that the marshal should sell whom the brig *Ceres* and cargo, and pay the net amount according to the stipulations of the following agreement between *Carvin*, owner of the privateer, on the one part, and *Gernon*, captain of the Spanish brig *Ceres*, on the other. It was also signed by the consuls of France and Spain.

“Whereas we find it impossible to settle definitively the difference existing between us, as to the validity of the capture of the brig *Ceres*, by the privateer *Le Vengeur*, we do therefore, refer the decision of the matter to our respective governments, obliging ourselves respectively to pay such damages and interest, as the said governments shall award. In the mean time we consent that the said vessel and her cargo, shall be sold by the marshal of the court of admiralty of *South Carolina* at public auction, for cash, after a notice of twelve days in the gazettes of

1804. "of *Charleston*. We consent, that the said marshal Gérard et al. " shall receive the amount of the sales, and after deducting therefrom all customhouse charges, and other necessary expenses, shall lodge the balance in the bank of *South Carolina*, to be paid over to the party, in whose favour the two governments shall decide: for which purpose no other form shall be required, than the production at the bank of a copy of said decision duly legalized by the consuls of *France* and of *Spain*. Reserving to ourselves respectively, a right to adopt such means for obtaining a decision favourable to our claims as to each of us may seem most expedient."

" Signed

Gérard.

Gérard."

On the 10th of June 1796, a letter was produced from the consul general of *France* at *Philadelphia*, to the French consul in *Charleston*, which states that the ministers of *France* and *Spain* at *Philadelphia* had determined the prize to be illegal, and ordered restitution thereof to the persons entitled thereto: they further directed that appraisers should be appointed to ascertain damages for detention.

The judge said that this certificate of the consul general of *France* was conclusive, as to a decision on the point contained in the agreement; and that such decision by the ministers of the two countries, resident in the *United States*, was sufficient to justify him in saying that the two governments had decided, and in ordering the agreement to be carried into execution. He added that, though doubts might have arisen as to the original power of the court to order a sale, yet, as it had been made by the solemn consent of all the parties in whom any interest then appeared, and as the agreement was sanctioned by the French and Spanish consuls, who are general agents for the subjects of their respective countries, not otherwise represented,

no

no objection to the jurisdiction could now be suffered to avail.

1804.

Gernon et al.

Cochran.

The marshal was, therefore, ordered to pay into the bank of *South Carolina*, the balance in his hands, of the proceeds of sale referred to, in the agreement, in the name and for the use of *Gernon*, and sundry other persons, who have since produced powers of attorney from those interested in the vessel and cargo. *Gernon* had originally been mate of the *Ceres*, but appointed captain by one *Golibart*, who then commanded her. A letter of attorney from *Golibart* to *Gernon* was produced, and contained full powers to act in *Golibart's* name and stead. This, the judge said, made him lawful representative, in a foreign port, of the owners and shippers concerned in the *Ceres* and her cargo, unless some more special power to the contrary should appear. Even admitting, as had been asserted, but not proved, that *Golibart* was dead, still *Gernon's* power subsisted as to all such of the concerned as had not thought fit, in the long period of eight years, from the commencement of these proceedings, to divest him of his general authority, by some special revocation of it. Three of the parties had done this. As it could not be doubted that the rest had received equal information of the state of the vessel, their silence must be construed into an acquiescence in *Gernon's* agency.

Dulaney,

1804.
October.

Pilots and others, assisting vessels in distress, beyond what their mere duty requires, are entitled to compensation.

Dulany, a pilot, v. Sloop Peragio.

THIS case comes before the court as a case of salvage, but on a full investigation of the evidence, it does not seem to be altogether such.

The sloop, it is true, had encountered the storm of the 8th *September*, and had lost her masts, with great part of her sails; but they had two on board, with one of which fixed to the stump of the mast, and a small spar, they had contrived to work her so as to bring her to anchor near *Bull's* inlet, on the 12th, four days after the storm. Here they were boarded by the pilot, in the forenoon of that day. The vessel was tight, and had provisions sufficient to last some time, and could have sent their boat for further supplies.

There is some contrariety of evidence respecting a conversation with the pilot upon his going alongside: but it was proved that the pilotboat took the sloop in tow, and arrived with her at *Charleston* in the evening of the same day. It is admitted that *some* compensation is due, over and above the usual rate of pilotage.

As no question of law arose in the case, I have consulted persons conversant in these matters, none of whom considered it as a case of salvage, but all agreed that compensation should be granted, by way of encouragement to pilots and others to do *more* than their mere *duty*, whenever circumstances might call upon them to exert themselves. Their opinion concurred with my own, that two hundred dollars, over and above pilotage, and costs of suit, would be a sufficient remuneration for this service.

I decree accordingly.

Dennis

*Dennis v. Brig Lear.*1805.
November.

THE libel filed in this case states that *Dennis*, owner of the brig *Lear*, sent her in November last on a trading voyage to *St. Domingo*, and bound to *Cape François*, where she arrived in December, and sold her *tid*, being cargo. Having taken in a return cargo, she proceeded, ^{ly confirmed} in February, to *Port de Paix*, for the sole purpose of joining sundry other American vessels, some of which were armed, and might protect her against the *Briegand* cruizers. She staid at *Port de Paix* only two days, and sailed from thence on the 2d of March last, in company with the other American ships, and bound to *Philadelphia*. On the 5th March following she was captured by the French privateer *Rencontre*, and carried into *Barracoa*. Here the cargo was taken out, and the vessel illegally sold to one *Taylor*, without any previous investigation or sentence of condemnation, according to the law of nations. She is now in the harbour of *Charleston*.

To this libel a claim and answer, interposed by *Taylor* and *Tavel*, owners of the brig, state that, being on a voyage from *Cape François* or *Port de Paix*, where she had been trading with the revolted negroes, she was lawfully captured and carried into *Barracoa* by the privateer. That as the vessel was in a leaky, disabled, and perishing condition, the captain of the privateer presented a petition to the agent of the government of *Guadalupe*, stating the circumstances under which she had been captured, and her then bad condition, and requesting that a provisional sale might take place. That this was granted, conformably to French ordinances and regulations, and she was accordingly sold at public auction to the highest bidder; the

1805.

Dennis
v.
Brig Lear.

the money arising from the sale being deposited to await the definitive sentence. That at the said sale, *Taylor*, as agent for *Tavel*, purchased the brig for 875 dollars, and, after she had undergone considerable repairs, sent her here with a cargo from *Barracoa*.

Several exhibits have been filed with these pleadings, among which are,

1st. The order for a provisional sale by the French agent at *Barracoa*, with a certificate from the American consul, that the said agent is duly authorized and appointed by general *Ernouf*, commander of *Guadeloupe*.

2d. The actual sale made under the said authority, and certified by said agent.

3d. The decree of condemnation of said brig and her cargo by the colonial prefect of *Guadeloupe*, and the commissary of justice for the said island; assisted by the commissary of *Marine*, charged with preparing the trial of prizes, the colonial inspector, and the secretary of commission.

The decree is founded on an arrêté issued 4th *June* 1804, by the captain-general of *Guadeloupe*, declaring that all vessels found trading to or from ports in possession of the rebels shall be considered as enemies of *France*, and shall be condemned as legal prizes, agreeably to the regulations in such cases.

The questions for me to determine are,

1st. Whether the provisional order for sale was sufficient to change the property.

2d. Whether the decree of condemnation can be reconsidered in this court, and altered and revised by me.

Nothing is more common in courts of civil law than interlocutory orders and decrees, which, if subsequently confirmed by a definitive sentence, have never been called in question. Sales under such orders are frequent;

frequent; especially of articles of a perishable nature. This seems to have been the case here, and I do not think that the propriety of the proceeding can be questioned by me.

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The decree of condemnation expressly ratifies the sale, and condemns both vessel and cargo as the property of enemies, according to their own previous regulation as to trade with the revolted negroes. How far they were justified in making such a rule is, in my opinion a matter of executive or legislative interference. I do not consider this court as competent to reverse the sentence of a foreign court where the property is condemned as belonging to enemies: it would lead to a right of appeal from such decisions, and would be highly improper. On this principle I decided the case of *Shetf* and *Turner*; that decree was affirmed on appeal, and must therefore be considered as a precedent. The case of *Rose* and *Himely* differed altogether from the present. There the condemnation is expressly declared to be in pursuance of an arrêté, passed subsequent to the capture. The décret was founded in error apparent on the face of it, for a law not in existence could not be infringed. The property, too, was in the hands of the marshal of this court, as belonging to the original owner, previously to the sentence of condemnation; nor had an order for sale ever been made. In *Rose* and *Himely*, the trade to *Hispaniola* was not interdicted till after the capture; in the present case the French arrêté had been published in all the American papers many months before. This was so well understood that most of the vessels engaged in this trade went armed, or under convoy of others that were armed; and it appears from the libel that the *Lear* knew the risque she ran, and went from the *Cape* to *Port de Paix* expressly for the purpose of sailing with armed ships from that place. Insurance had risen considerably

bly

1805. bly upon risques like the present, when the *Lear* sail-

Dennis ed; which was not the case as related to the voyage in

Brig Lear. *Rose* and *Himely*.

Upon the whole I think myself bound in the present instance by the sentence at *Guadaloupe*, the court there being competent to the condemnation of property as belonging to their enemies, under regulations that existed before the condemned voyage was undertaken.

I dismiss the libel, with costs, subsequent to the filing of the sentence of condemnation.

John

John Thomson et al. v. Ship Nanny, John Ainsworth, master; and Frederic Ferguson et al. v. Ship Jack Park, James Remsen, master.

1805.

THE circumstances of these two cases are so nearly similar that all the arguments applicable to either apply to both. I shall, therefore, consider them together in this decree. The libel states that on the 17th *September* 1804, the parties libellant were shipped in the port of *Liverpool* on board the above-named vessels, (being letters of marque) to proceed from thence to the coast of *Africa*; thence to a port or ports in the *West Indies*; thence to a port in the *United States*; and thence back to *Liverpool*, where the voyage was to end, at the respective wages men- tioned in an exhibit filed with the libels. That they performed their duty as seamen on board, until their arrival in the port of *Charleston* on 22d *June* last, having stopped at *St. Thomas* and *Surinam*.

The libel also states that on the voyage from *Africa* to the *West Indies*, the captains of these two armed vessels, confederating together and with their chief mates, pursued a system of plunder and piracy on the high seas, and on the 12th *May* last boarded a Portuguese ship and plundered her of sundry articles stated in the libel; and on the 14th *May* following, pursued the same conduct towards another Portuguese ship.

The libels also charge, that during the voyage the seamen were unnecessarily put to short allowance, and one of them illegally confined. That, on their arrival in *Charleston*, the libellants, as well from a sense of moral duty, as from a fear of being tried as pirates and partakers of the guilt of the unlawful acts aforesaid, instituted prosecutions against the captains and mates

1803. in the circuit court of the *United States*, and have been bound under recognizance to appear and prosecute for the offences aforesaid; and, therefore, that it would be improper for them to proceed to sea in the said vessel, because they could not return in time to fulfil their recognizance, and because it would subject them to the danger of being taken as pirates: as the former conduct of the said captains and mates made it probable that they would proceed in their career of plunder, to which they did not desire to be instrumental: because also the libellants would probably be treated inhumanly, and prevented thereby from proceeding in said prosecution. For these reasons, they think themselves entitled to their discharge, from said vessels, and to payment of their wages now due.

To these libels, claims and answers have been put in by *J. Ainsworth* and *J. Remsen*, subjects of the king of *Great Britain*, and commanders, respectively, of the ships *Nanny* and *Jack Park*, duly commissioned, armed and equipped as letters of marque and private ships of war. These answers admit the several matters stated in the libels, as to the nature of the voyage and terms of enlistment. They also acknowledge the boarding, at sea, of two Portuguese vessels, and taking from them sundry articles of which they were in want, and which they thought they were entitled to take, on paying for the same, agreeably to the regulations of certain acts of the British parliament; and, so far from meaning to act illegally, they gave their names and the names of their vessels to the captains of said Portuguese vessels, with every particular relative thereto. A list of the articles taken by them is given in their answers; and they affirm that if any thing was taken, not mentioned in said list, it must have been taken by some of the boat's crew, without their consent or knowledge, or that of their mates.

The answers also admit the putting to short allowance,

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ance, from necessity; and the confining of some of the men, for mutinous conduct. The prosecution of the voyage, and arrival in *Charleston*, as stated in the libel, are also admitted. The claimants then conclude with a plea to the jurisdiction of this court, alleging that the said ships are British letters of marque, and the libellants subjects of his Britannic majesty; that their claims to wages are solely cognizable in British courts; and they also plead in bar the treaty of amity and commerce between the *United States*, and his Britannic majesty, dated at *London*, 19th November 1794, the 25th article of which they desire particularly to rely on:

In arguing the case, it was contended, in support of the plea to the jurisdiction, that the simple question was whether, the vessels being foreign, the seamen foreigners, and the voyage not ended, this plea should not be maintained. That the vessels were entitled, by treaty, to protection in the courts of the *United States*, as being private vessels of war. That every country has its own laws and regulations in military matters, with which this court can no more interfere than with its laws of revenue. That if this court should interfere to break up the voyage and cruize of these vessels, it would do so in violation of our neutrality, and in breach of our treaty with *Great Britain*. That, as an act of congress interdicted the parties from recruiting in our ports, these vessels could obtain no seamen here, and would be altogether destitute of their crews, if the libellants should succeed in obtaining their discharge; that freight being the mother of wages, none can be demanded until the voyage be ended, and the freight earned; that the articles are a solemn contract between the parties, which, not a law of congress, much less an act of this court, can dissolve; that the libellants, became bound to prosecute by their own voluntary act; that the information should have been given at *Surinam*, where a British court could

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could have determined the matter without delay; that the seamen postponed their complaint merely to set up claims which, by desertion, they have forfeited.

On the part of the libellants it was contended, that there were two classes of seamen, parties to the suit; 1st, Those who claimed their discharge on account of cruel treatment. 2d, Those who claim a discharge by operation of law. It was argued that the voyage was ended by the act of the captain, and that this court has jurisdiction, and will extend protection to all who claim it. That by the laws of *England*, foreigners arriving there must be protected in all their courts, which will take notice of the *lex loci* where the foreigner belongs, and give redress accordingly. Contracts bearing interest of 20 per cent. had been enforced in *England*, because such was the legal interest of the place where the contract was made. That the voyage being ended, and the men discharged by operation of law, they are entitled to wages. That from the peculiar situation of seamen their remedy is chiefly *in rem*; and two cases were quoted from *Hopkinson's Reports*, (196. 206.) to shew that courts of admiralty (contrary to the doctrine of Sir *William Scott*) would and did exercise this jurisdiction. The argument was closed by observing that the recognizance to appear and prosecute was virtually a discharge, whether wages were due, or not; though the one was a necessary consequence of the other.

In reply, two cases from *Robinson's Reports* (1. 271. and 4. 240. Eng. ed.) were relied on to shew that a neutral court cannot exercise jurisdiction over foreign seamen and vessels, where the voyage is not ended; or, admitting that they have a concurrent jurisdiction, they are not bound to exercise it. Three facts, it was said, were evident from the pleadings: 1st, That the vessels were British; 2d, That the seamen were also British; 3d, That the vessels were armed,

armed, and by their articles obliged to return to *Great Britain*. That the libellants, therefore, have no claim upon the jurisdiction of the courts of this country, which may be exercised or not, as those courts shall see fit. That seamen's wages were not originally of admiralty jurisdiction, however salutary might have been the stretch of power that made them so. That the recognizance neither does, nor ought to, operate as a discharge; since, if it did, a mere affidavit of an assault would be sufficient to destroy a voyage, by releasing the seamen from their articles, to the infinite injury, if not total annihilation of commerce. In answer to the cases from *Robinson*, it was contended that *seamen's wages* were as much determinable by the law of nations, as *salvage*.

On a former occasion, about seven years ago, I determined a question on a plea to the jurisdiction of this court, in a case somewhat similar to this; since which I have declined interfering between foreigners, respecting seamen's wages, from a conviction that, unless under very particular circumstances, it was proper to refer them to the tribunals of their own country, where the *lex loci* being better understood, more complete justice could be done than in a foreign court, at a distance, and not thoroughly acquainted with the rules obtaining in the country of the parties.

I stated my doubts on this point at the commencement of this cause, declaring at the same time my wish to have the matter reargued. I have attended to the arguments and observations, on both sides, with satisfaction, and I proceed to deliver my decree after much reflection, and a full consideration of all that has been said.

Mariner's wages were not always recoverable in the courts of civil law, even amongst maritime nations; and in *England*, it was after long contests between the judges

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1805. judges of these courts and those of the courts of common law, that the latter yielded the point.

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^{Ship Nanny.} Two reasons operated to produce the concession; 1st, That seamen could, in the civil law courts, join in one suit. 2d, That, in these courts they could obtain summary justice, which, in those of common law, was denied by the nature of the proceedings there. Nevertheless, a concurrent jurisdiction is exercised by the latter.

Two cases from *Robinson's Admiralty Reports* were produced, and much relied on by defendants' counsel, relative to the jurisdiction of British courts of admiralty, respecting foreigners. Two cases from *Hopkinson's Reports* were relied upon by the counsel opposed to them, as being directly hostile to the general doctrine. I have carefully examined these four cases; but do not see the variance contended for. In the case from *Robinson* 1. 251. Sir *William Scott* overruled the plea to the jurisdiction of the court, partly because it was not a case in which foreigners alone were concerned, and partly because it was a question of salvage, which, he says, is peculiarly referable to the *jus gentium*, and materially different from a mariner's contract which is created by the particular institutions of each country, and must be applied, construed and explained by its own particular rules. He goes on to say, "There might be good reason, therefore, for this court to refuse its interference in such cases, remitting them to their own domestic *forum*." He adds: "between parties, all foreigners, if there were the slightest disinclination to submit to the jurisdiction, I should be inclined not to interfere." He desires, however, not to be understood as delivering a settled opinion, although it involved a case of salvage.

In the other case from *Robinson* (4. 240.) which respected the possession of a vessel, (but involved *property*

(party too) the judge says that it was accompanied by a letter from the American minister, stating that the parties were all Americans, and willing to submit to the jurisdiction of the court. He was, therefore, induced to entertain the suit, which, without such application from a foreign minister, and such consent of parties, he should by no means have been willing to do, having no disposition to interfere in the disputes of foreigners.

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In the first case quoted from *Hopkinson* (196.) two separate causes of suit are contained; one respecting an hypothecation, made that the vessel might be enabled to proceed from the *Havanna* to *Philadelphia*: the other for wages on board said vessel from *Havanna* to *Philadelphia*, as a pilot. The voyage therefore was ended, on her arrival at *Philadelphia*, as to both these causes of action, and the court could not decline the jurisdiction. This case, therefore, does not differ from the principles laid down by Sir *William Scott*.

The other case from *Hopkinson* (206.) was that of a vessel and crew wholly French. The suit was brought on an engagement for a *voyage certain*, from which there had been a total deviation for upwards of two years. *France* and *America* were then allied, and no consular convention existed. The prayer was for wages and a discharge, and no plea was made to the jurisdiction. Under these circumstances the court took cognizance of the cause. But from this solitary case nothing can be inferred to impugn the doctrine laid down by Sir *William Scott*, strengthened as it is by the two cases from *Vesey junr.* (3. 447. and 4. 577.) for though this question did not expressly come before the court of chancery, yet the determination in both the last mentioned cases, shews the reluctance of that court to interfere between foreigners; in *Brown's civil and admiralty law* (2. 119.) the author says: "It doth
" not

1805. "not seem possible to draw an exact line about the jurisdiction which this court will exercise as to foreigners. It must depend on the nature of the question: if it arises from the particular institutions of any country, to be applied, construed, and explained by the particular rules of that country, it will not be entertained. Such are questions arising upon the contracts of mariners, which will be remitted to their own *forum*; because the contract for wages cannot be the subject of a suit, till the return of the vessel, or *end of the voyage*. But (he adds) where the question is one arising out of the *jus gentium*, to be determined by sound discretion, acting upon general principles, the court will hold plea of it. Cases of salvage, &c. and suits on bottomry have often been entertained in this court between an Englishman and foreigner, and between two foreigners."

Upon mature consideration of these cases, and of the reasoning thereon, I am of the opinion which I stated at the opening of the cause: "that this court should be very cautious in exercising jurisdiction as to foreigners, unless under peculiar circumstances." At the same time, I would not be understood as relinquishing jurisdiction where it may appear proper or necessary to prevent a failure of justice.

In the case before me, it is admitted on all hands, that the voyage is not ended, and that, by the contract, no wages are due till then. But it is contended that the seamen are discharged by operation of law. If so, this court cannot prevent it; but it will not, by any act of its own, impair the obligation of the contract. If an act of piracy has been committed, and if the recognizance to prosecute is a legal discharge, another consideration arises, namely, that in piracy all are principals; and where (says *Molloy*) a letter of marque

marque commits piracy, it brings on a forfeiture of the ship, and the wages are also lost.

Upon the whole, although I do not say that this court has no jurisdiction in matters respecting foreign seamen, yet I think it ought not to exercise any in the case now before it, but remit the parties to their own domestic forum. The libellants cannot complain at being thus turned over to their own courts; for they might have applied for redress at Surinam, where such courts exist. Having neglected to do so, they must blame themselves.

I order and decree that the libel be dismissed, but without costs; for suits heretofore maintained, in cases apparently similar to this, might well mislead the parties in the present case.

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2 F

William

*William Jerby v. 194 Slaves saved from the wreck of
the brig Swan.*

1806.

May.

One fifth decreed, the danger not having been very great, and it being easier to remove negroes than any other sort of cargo.

THE brig *Swan*, *Smith*, master, on the 10th instant, early in the morning, got aground at the distance of six miles from the shore of *Bull's Island*, on this coast. She had on board a cargo of 194 slaves. At nine o'clock in the morning of the same day, she was seen by captain *Jerby* of the schooner *Victory*, who, observing signals of distress, bore down to the vessel, and, after some conversation, agreed to take the crew and cargo of negroes on board his schooner. The boat and crew of each vessel assisted in nearly equal degree, and the business was completely effected by eight o'clock in the evening: on the following morning at ten o'clock they all arrived safe in *Charleston*. It appeared in evidence that another vessel had passed them previously without affording relief. It was also in proof, that before the *Victory* came in sight, the supercargo of the brig had gone to *Charleston* in the small boat, to procure assistance, and returned the next morning with two vessels for that purpose; but, on finding the brig abandoned, he came back to *Charleston*. The negroes saved have been appraised by order of the court, and are valued, with the consent of parties, at thirty-eight thousand eight hundred dollars.

The service rendered upon this occasion was great, and, at the time, was considered by the captain and crew of the brig as essential to the preservation of their lives, and those of the negroes. Another vessel had neglected the signal of distress; and it is hardly possible that the negroes could have been preserved during the night, that succeeded their deliverance; for the waves beat over the brig in such a way that many

of

of them must have been washed overboard. The supercargo would have returned too late to effect what was done by the people of the *Victory*: captain *Jerby* must be considered, therefore, as the means of rescuing them from most imminent peril.

1806.

Jerby

v.

190 Slaves.

The risque, indeed, does not appear to have been great, for the vessels kept at a safe distance from each other. Twelve hours were sufficient for the business, and the schooner did not go at all out of her course. From the nature of the cargo, too, it is evident that the trouble of conveyance from one vessel to the other was little in comparison to that of hoisting goods out of the hold of a vessel, and putting them on board another lying alongside; besides that, in the latter case, much damage is risqued to the vessel of the salvors, if the sea, as upon this occasion, run high.

This case resembles that of *Deliesline* and *Taylor* against the schooner *Friendship* more than it does any other decided by me. Some that have been quoted were instances of derelict, saved by great labour and risque; and in such I have given one half of the value by way of salvage. But the circumstances here will not justify any such proportion. In the case of the *William Beckford*, decided by sir *William Scott*, greater exertions were made, and more danger incurred; yet among the numerous salvors not quite a seventeenth part was divided. In *Deliesline's* case, the amount saved was 25,000 dollars; the time employed was nearly the same as in this instance; and the risque certainly greater. I decreed one fifth by way of salvage, and all parties were satisfied. I acted then with great deliberation, and I have carefully compared the circumstances of that case with this. Seeing no reason to deviate from the principles there established, I decree the same proportion of one fifth to the libellant on the present occasion. Let costs of suit be paid by the claimant.

Young

Young et al. v. Tavel.

1806.

June.

Property purchased at a provisional sale at Barracoa, afterwards confirmed by sentence of condemnation of the constituted authority at Guadaloupe, not liable to restitution in a suit in personam of the purchase at Barracoa.

THIS is a suit *in personam* against *Tavel*, to recover the value of twenty hogsheads and eighteen barrels of sugar, and a large parcel of logwood; part of the cargo of the schooner *Enterprize*, belonging to the libellants. The libel states that this vessel was captured on the high seas by two French privateers, and carried into *Barracoa*, where the said articles were taken out of the *Enterprize*, put on board the brig *Lear* belonging to the defendant, and brought from *Barracoa* to *Charleston*, where they were landed. The libel prays that they may be restored.

Tavel's claim and answer admits the capture of said schooner by two French privateers duly authorized to seize all vessels trading with the revolted negroes of *St. Domingo*; it admits also that she was sold at *Barracoa* with her cargo, by order of the agent of the government of *Guadaloupe* then residing at *Barracoa*. It states that the sale was provisional, and the money ordered to be deposited, to abide the definitive sentence of the government of *Guadaloupe*. This was afterwards obtained, and a copy of it, marked B, is filed with the answer. The defendant says he was unapprised that the sugar and logwood mentioned in the libel were part of the said cargo, but admits that he received twenty-nine hogsheads and sixteen barrels of sugar from his agent at *Barracoa*, which were shipped on board the brig *Lear*, on account of the proceeds of a shipment made by him to *Barracoa*. The claimant pleads the decree of condemnation and sale of said articles in bar to the jurisdiction of this court; and insists

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sists that no compensation should be granted, because the proceedings are *in personam*, not *in rem*, and that any sum the court might award would be in nature of damages, which ought to be grounded on some tort or wilful trespass, which he cannot have committed, as he was a *bona fide* purchaser of the property in question.

It was argued by the counsel for the libellants, that

- 1st. The property is fully proved.

- 2d. That the trade to *St. Domingo* was lawful at the time of this capture, and that therefore the decree of condemnation at *Guadaloupe* was void.

- 3d. That in the case of *Rose and Hamely*, the decree was declared void, as being founded on an *ex post facto* law; and that the present decree, being founded in error, is also void.

- 4th. That as the goods were not of a perishable nature, the sale was contrary to an arrêté.

- 5th. That the definitive sentence against the vessel is only by implication extended to the goods, and therefore void as to them.

- 6th. That by a determination of the supreme court of the *United States*, sentence of a foreign court does not decide the question of property.

Lastly, That the proof offered of the sentence at *Guadaloupe* is not duly authenticated.

For the respondent it was said, that this case is similar to one formerly determined in favour of the same party, except that this is a suit *in personam*, and no restitution can be decreed; but damages only as for a tort or trespass, which is not pretended.

That the agent at *Barracoa* was a purchaser in market overt, and the answer states, that the property received from that place was in return for a cargo shipped from hence in the same brig.

That the provisional sale was lawful and regular, and the purchase at it equally so, though the money arising

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arising from said sale was retained till condemnation should take place. That even if the decree at *Guadalupe* had been different from what it was, still this purchase in market overt would have been valid: the claimant being bound to recur to the money deposited; and not to the goods in the hands of a fair purchaser. But as the decree of condemnation actually took place, it must be considered as final; that it is certified in the usual form, and takes away all pretence for a suit here.

The principal points that occur in this case have already been investigated by me in the case of *Rose and Himely*, which, however, differs from the present in some material respects. The sale there was made without any provisional order, and before any decree. The arrêté upon which the decree finally rested was, itself, issued after the capture of the vessel.

Here, the property was sold by a provisional order, from a competent source, and the money retained to abide the final decree, which *confirmed the sale*.

It must also be recollectcd that this suit is *in personam*; every thing relative to the goods being out of the question. The only point now left for the decision of the court is, whether the respondent has done any act that subjects him to restitution. His answer states that the articles he imported were a consignment from his agent at *Barracoa* in return for a cargo shipped from hence; that they were purchased in market overt; that the sale was made by order of a competent jurisdiction, and was afterwards confirmed by the constituted authority at *Guadalupe*. The only questions then for me to decide are,

1st. Whether this decree is sufficiently authenticated.

2d. Whether, under the circumstances of the case, it can be set aside.

3d.

3d. Whether the respondent has done any thing to subject him to a suit *in personam*.

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The decree appears to me duly authenticated, and has every mark of being genuine; a witness has been produced who proves the signatures.

I do not think that I am authorized to set it aside, for the property is condemned as belonging to enemies, under an arrêté of the governor of *Guadalupe*; and I have already determined a question like this, as to the validity of a foreign sentence.

Nothing appears to me to make the respondent liable to pay damages, or make restitution. I am of opinion, therefore, that the suit be dismissed with costs, and I decree accordingly.

James

1806.

James George v. Ship Arctic.

Compensation fixed by the court, upon consultation with merchants and owners of ships as to the value of service rendered.

THIS is a petition for compensation to Mr. *George*, who assisted with his boat and several hands in getting off the ship *Arctic*, which was driven on shore in the storm of *August* last. It appears that the ship lay from *Friday* till *Monday* without other efforts for her safety than such as were made by her crew. On *Monday* Mr. *George* went to her assistance, received the command as soon as he went on board, and held it till she floated: Mr. *Cohen*, who had also gone with a boat and hands to assist, brought her up to *Charleston*.

Cohen had been of great service by carrying with him a spare anchor, as well as by his advice and exertions. They succeeded in floating the vessel on *Wednesday* evening; but *George* and *Cohen*, with their people, remained on board till *Saturday* evening.

I have no hesitation in admitting this claim to compensation; for services to vessels in distress must be encouraged: nor will the law make a distinction between such as are voluntary, and such as are hired. The former, at least, must have their reward; and that not upon too narrow a scale, for the reason I have already given.

In fixing the amount of compensation upon this occasion, I called in the persons best qualified to assist my judgment, merchants and owners of ships, acquainted, by experience, with the nature of these services. I stated the circumstances, without naming the parties. After some consultation, they named the sum of 150 dollars, as an adequate compensation for *George*, and his boat's crew; and as that sum accords with

with my own view of the case, I do order and decree, 1806.
that the marshal pay that sum to Mr. *George*, out of James George
the proceeds remaining in his hands from the sale of ship *Arctic*.
the ship.

As the petitioner withdrew his first demand, and made a second, after reference of the first to the register, I direct that each party pay his own costs.

Waite et al. v. Brig Antelope and cargo.

1807.

THE brig *Antelope*, an American bottom, and owned by American merchants residing in *Baltimore*, on her return from *St. Thomas*, a neutral island, to *Baltimore*, with a cargo belonging to American citizens, was, on the 6th day of *December* last, on the high seas, taken possession of by the British frigate *Hebe*. Six of the crew were removed into the frigate, and an officer and seven men of the latter were put on board of the *Antelope*; with orders to carry her to *Jamaica* for adjudication, upon the ground of having no certificate of the cargo signed by an American consul.

Two days afterwards, the remainder of the crew of the *Antelope*, assisted by a number of passengers, overpowered the officer and men of the *Hebe*, and on the 20th *December*, brought the brig into the harbour of *Charleston*. They now libel for salvage. The owners, by their agent, have filed a plea in bar to the suit, alleging that this is not such a case as entitles to salvage, as a right. The court is called upon to decide whether this is a valid plea. The case is new, and

1807. important, both as respects these parties; and as tending to establish a precedent.

*v.
Brig Antelope* Attempts are frequently made to extend the doctrine of salvage to cases where it does not apply.

Salvage is due for assistance in dangerous situations at sea, and for property preserved, after having been cast on shore. So where it is rescued from enemies or pirates. But in all these instances it must be shewn that the thing saved was in danger, without such aid, of being lost, or materially injured. It cannot be denied that, according to the acknowledged law of nations, neutral vessels navigating the high seas are liable to examination and search; and, in some cases, to be carried into port for adjudication. All the modern treaties between maritime nations recognize this doctrine, and it has been expressly acceded to in the treaties to which the *United States* have, at any time, been a party.

If on such investigation it appear that the neutral vessel was improperly detained, the tribunals of the belligerent are bound to restore her, with damages for loss and detention, and with costs of suit. But have the crew of a vessel so detained, a right to resist search in the first instance, or to recover the vessel by force of arms previously to adjudication? If lives are lost in attempting this, and the parties are afterwards retaken, may they not be proceeded against for murder? And will not confiscation of vessel and cargo be the consequence of merely an endeavour to rescue?

These are questions which I shall not enter into at present; but they ought to be seriously examined before attempts of this sort are made, and before claim of salvage is set up as being in all cases matter of right.

That commerce has sustained very great injury by the wanton exercise of this power of the belligerents, every day's experience proves. Government, in this country,

country, does not sleep over the violated rights of the 1807. citizens, and redress is sometimes obtained. It has ^{Waite et al.} much oftener been denied; but does this authorize individuals to take the law into their own hands, and by endeavouring to redress themselves, to expose the peace and happiness of their country? Certainly not.

The same mode of reasoning will apply to the courts of the neutral power. In this country, they are bound, by the constitution of the *United States*, to determine according to treaties and the law of nations, wherever they apply. It would ill become them, then to exercise jurisdiction expressly taken away by these treaties, and by this law; which, I apprehend, I should do, if I were to decree salvage in the present case as matter of right.

The cases quoted by the advocates on both sides relate wholly to recaptures of neutral vessels by one belligerent from another. In these instances it was the established practice to restore neutral property, *without salvage*, previously to the war produced by the French revolution. This was said to be a reasonable rule, no service of importance being rendered by the recaptor, to the unoffending neutrals; who must be released with costs for seizure and detention, as soon as the original captor should bring the matter before the tribunals of his own nation. For it must be presumed that those tribunals know and respect the obligations laid upon them by the laws of nations. 2 Rob. 200.

This doctrine is further recognized in 4 Robin, where it was decided that salvage was not due *generally* on a recapture of neutral property. It must be shewn that by some edict, or uniform practice, such property would have become subject to condemnation in the courts of prize of the capturing belligerent: in which case, salvage might be demanded.

If

1807. If this holds with respect to recaptures of neutrals
Waite et al. among belligerents, it must certainly apply with more
^{v.}
BrigAntelope force in the present case; and the plea in bar must be
sustained. Let the libel be dismissed; but the costs
must be paid by the claimants: for though I cannot
give salvage as a legal right, I think the actors are en-
titled to liberal compensation for their zealous, though
mistaken endeavours to serve the *owners*. Whether
this court could lend its aid in any other shape need
not, I hope, be inquired; and I am persuaded, from
the declaration made on behalf of the owners, that all
further interference on my part will be unnecessary.

Humphreys

Humphreys v. Brig America.

1807.

February 24.

THE actor, on the 18th *November* last, shipped as first mate on a voyage from the coast of Africa to this port. His wages were not payable monthly, but he was to receive sixty guineas when he should arrive, per quence of such impro- and the vessel be entered, at *Charleston*; provided he acted as first mate on board the brig to the intended port. The vessel sailed on the 4th *December* following, and arrived here on the 4th instant.

It appears that on the 11th of *January*, the actor was dismissed from his station of first mate, and was not reinstated when they arrived here.

It is contended on behalf of the owners that he has forfeited all claim to wages on account of improper behaviour on board, and an attempt to raise a mutiny. If this defence be maintainable, mutinous behaviour at sea amounts to loss of wages; and this point I am to determine.

It was admitted that the actor performed his duty as mate till the 11th of *January*, when he was dismissed from that station. That he is an able seaman, and that he had committed no previous fault, except that, at times, he was abusive to the captain and passengers. The immediate cause of his dismissal was his refusal to obey an order of the captain to send a barrel of flour to the quarter deck, which, however, was afterwards complied with. No other charge is alleged against him. The laws of the *United States* are silent as to forfeiture of wages, except in the single case of desertion. I have carefully examined the marine law as to causes of forfeiture like the present, and find it laid down in the book called "Dominion of the Sea" 203., that for mutiny seamen shall be corporally punished.

1807. *nished.* *Mollov* (2. 3. 2.) says a disobedient mariner ^{Humphreys} may be discharged at the first port, and that he shall ^{v.} ~~Brig America.~~ forfeit *half* his wages, and all his goods within the ship.

By the rules of the navy of the *United States*, mutiny is punishable by death, or such other punishment as a court martial shall direct. By the marine law the master may punish contumacious behaviour corporally, or by putting in irons, if necessary.

In the present case, the behaviour of the actor was very improper, but the captain chose to inflict no other punishment than removal from his station as mate; after which he does not appear to have behaved improperly, or to have interfered in the management of the vessel. He was, however, the only navigator on board, except the captain; and would have been necessary to the safety of the vessel, if any accident had befallen the captain.

No ill consequence arose from his improper behaviour; and as he was dismissed, instead of suffering corporal punishment, which might justly have been inflicted. I do not think the whole of his wages ought to be retained. That he did not continue to act as mate throughout the voyage was the act of another; not voluntary on his part. On the whole, I think he must receive compensation for the time he actually did duty, that is, for about half the voyage. I decree that he be paid one half the sum mentioned in his contract; and that each party pay his own costs.

Roberts

Roberts v. Dallas.

1807.

March 20.

IT appeared in this case that the actor *Roberts* ship-ped on board the *Norfolk* on a voyage from *Charleston* to the coast of *Africa*; but the articles go no further. The court, therefore, in a late suit for wages, decreed that the voyage had ended on the 21st *October*, when the vessel arrived on the coast. At this period, in consequence of some highly improper behaviour of *Roberts*, the captain was compelled to apply to the only tribunal that existed there, for assistance, which was granted. From that time, *Roberts* did no further duty on board, and his wages were discontinued. This the court sanctioned, because the articles were at an end, the actor refused to work, and went so far as to resist the captain and seize his person. Such conduct amounted to a forfeiture of every claim as regarded the vessel, even for a passage back; he might have been turned ashore, and would have been without redress. As this was not done, it will be necessary to state circumstances as they took place.

Upon the captain's application for assistance, a corporal and four men were sent to him. *Roberts* refused to give himself up, and went down the scuttle. The captain ordered the soldiers to fire on him; but they, very properly, declined. He next desired them to knock him down; but this, too, they refused to do; on which he himself advanced against *Roberts*, and struck him with a drawn sword on the left breast. *Roberts* exclaimed: "You have done for me." The captain then dragged him out, and carried him to the cabin, where he dressed his wound and gave him a dram; after which he sent him ashore under the guard of the soldiers. *Roberts* was subsequently tried by a court martial, and sentenced

The voyage being ended, the captain might have discharged the offending seaman, the actor. But, having again taken him on board, was not justified in assaulting and imprisoning him, without any new crime.

1807. sentenced to receive a hundred lashes for mutiny on board this vessel; but the punishment was withheld at the captain's request, who brought him again on board the vessel, put him in irons, and kept him for some time on prisoner's allowance: on the arrival of the vessel in this port, he was suffered to come on shore.

Roberts
Dallas.

The suit is brought for an assault and false imprisonment. The facts are admitted; but the captain pleads that he was knocked down by *Roberts*, that his crew were mutinous, and that the wound he inflicted upon the actor was accidental, and without intention. It was, at any rate, unjustifiable *at the time it was given*, for he was then assisted by a strong guard, and *Roberts* was endeavouring to get out of his way. This rash step would have had a very different complexion, if it had been taken at the moment the captain was knocked down.

The wound, however, though it might have been fatal, seems to have been attended with no great danger.

The subsequent confinement of this man in irons was also unjustifiable; the contract was at an end, and the man's behaviour so improper as to discharge the captain from any sort of obligation to bring him back. If, therefore, he voluntarily received him on board, he had no right or authority to confine him, unless fresh signs of mutiny or misbehaviour had appeared; but this is not pretended. The assault and imprisonment are, of course, fully proved, and damages must be awarded.

I am of opinion, however, that this misconduct of the captain is considerably *mitigated* by the former conduct of *Roberts*, and by the remission of a hundred lashes awarded by the court martial, which was obtained by the captain's intreaty. I decree, therefore, that the latter pay to the actor the sum of fifty dollars, with the costs of suit.

Ames

*Amos Ryan v. Ship Cato.*1807.
July.

THIS case comes before me upon petition for compensation out of the ship *Cato* and cargo.

The petitioner states "that he is master and owner of a fishing smack. That near the gulf stream, on or about the — last, he fell in with the ship *Cato*, loaded with cotton, &c. That on boarding said ship, she was found without any person on board. That he thereupon took her in tow for two days and two nights, when the weather becoming boisterous, he anchored her in eight fathoms water, nearly in sight of the *Charleston* lighthouse. That having nobody on board his smack but one negro, he could not leave any person in possession of the ship. That in attempting to let go the ship's anchor, he made exertions by which, for some time, he thought his life endangered, as the blood gushed from his mouth in consequence of a violent strain. That these circumstances compelled him to leave the ship at anchor, and to come up to *Charleston*, where, as soon as he arrived, he made report of what had been done. That he then hired a vessel and several hands, and proceeded in search of the ship, which, in the heavy gale of that night, had parted from her cable. That, pursuing a direct course, he afterwards found her in possession of *Mr. Mackay*, and others, who would not suffer him to meddle at all with ship or cargo. That he complained of this conduct, conceiving himself fully entitled to a proportion of salvage, for what he had done. That he was at length permitted by said persons to take with him two bales of wet cotton, which he afterwards sold at auction

Petitioner had suffered a claim for salvage to be preferred and decided on, before he made any application for a proportion thereof. Under all the circumstances the court ordered him a compensation out of the proportion of proceeds, reserved for the owners, but remaining in the marshal's hands.

1807. " a trifling sum, by no means adequate to his labour
 Amos Ryan " and sufferings, and to the expenses he incurred in
 V. Ship Cato. " endeavouring to preserve the vessel. That without
 " his services as above stated, in towing and anchor-
 " ing the ship, she must have foundered; or, at any
 " rate, fallen into other hands than those of the per-
 " sons to whom this court had decreed salvage. That
 " the petitioner was astonished when he heard of such
 " decree, having never been apprized thereof by the
 " publication of any monition, or advertisement of
 " any sale by the marshal; though the salvors well
 " knew the petitioner's claim. That from his igno-
 " rance of the proceedings, and the haste with which
 " they were transacted, he never had any opportunity
 " of preferring his suit to this court for what he con-
 " ceives himself justly and equitably entitled to. He
 " prays, therefore, that he may be allowed to prove the
 " several matters set forth above, and that the court
 " will give him relief," &c.

This is a case differing from any other that has come before me, inasmuch as the claim for salvage had been previously satisfied to the amount of *one half* of the property saved; this being a vessel derelict. If the petition should be dismissed, the petitioner would have no cause of complaint, since he is alone to be blamed for ignorance of the former proceedings. He should have applied in time, and *originated* the steps necessary to procure him compensation.

It is true that no monition issued; but this was omitted, because the respective agents of the owners and underwriters were before the court, and suggested that a monition was not necessary. The sale of the articles on *Edisto Island*, instead of their being brought for that purpose to *Charleston*, was likewise with their consent. The court knew nothing of any *other* interest.

The

The petitioner's services cannot be denied, and the 1807.
strong desire I feel to encourage similar exertions in- Amos Ryan
duces me, even at this late hour, to take notice of this Ship Cato.
petition. It appears that, if the storm had not prevent-
ed, this man would have brought the vessel into port,
and been entitled to the whole salvage. At any rate,
his share would have been larger, if he had come
sooner to demand it.

As it is, I cannot take back any part of what has
been allowed to the other salvors, because they are not
at all to blame in the business: and it is contrary to the
rule by which I have hitherto been guided in cases of
this sort to take from the original owners more than
one half of their property, for compensation, under *any*
circumstances.

However, as I do not wish that the petitioner should
go altogether unrewarded, and as the remaining half
of the proceeds of this sale are in the hands of the
marshal, I decree that the petitioner receive therefrom
the sum of two hundred dollars.

Harrison

1807.
Nov. 13th.

Harrison v. Sterry et al.

If the persons or property of debtors of the U. States are within the jurisdiction of our courts, the U. States have a priority to all other claimants.

BIRD, Savage and Bird, merchants of London, had been agents for the United States from the month of June 1802, about which time they had received remittances on account of the United States, amounting to 127,171 dollars; with other sums that have been since put into their hands: and this long before the existence of any other lien produced in this cause.

The attachment act of this state is not affected by a commission of bankruptcy in England. No difference here between foreign and native creditors, under that act.

An agent of the United States in England cannot, by conforming to the bankrupt laws there, lessen the priority established in favour of the U. States here.

In November 1799, a house consisting of the same parties was established at New-York, under the firm of *Robert Bird and Co.*

On the 10th December 1801, *Henry Mertins Bird*, and *Benjamin Savage*, the *London* partners, executed a power of attorney to *Robert Bird*, the partner, residing at *New-York*, in the usual form, appointing him their attorney for their joint and separate concerns, or as partners with *Robert Bird*, under the firm of *Bird, Savage and Bird, of London, or Robert Bird and Co. of New-York*. In this deed, none but the usual powers are given to *Robert Bird*.

On the 3d December 1802, a deed under seal was executed by *Robert Bird* in the names of *Bird, Savage and Bird*, which he signed and sealed for himself, and for each of them, as their attorney. On the 31st January 1803, he signed another paper of the like tenor and import, but without a seal, in the name of *Bird, Savage and Bird, and Robert Bird and Co.* By these he assigned to the complainant *Harrison*, his executors, administrators and assigns, upon the trusts therein mentioned, all their shares in certain goods and merchandize on board the ship *Semiramis*, bound to the *East Indies*, and the profits thereof; and also the debts of *Legaré, Theus, and Prioleau*, and two other mercantile houses in *Charleston*.

It

It does not appear that these papers were recorded, or notice of the assignment given to the debtors.

1807.

Harrison

v.

Sterry et al

Six days after the date of this assignment, the house of *Bird, Savage and Bird*, in *London*, stopped payment; and on the 27th *March* following the house of *Robert Bird and Co.* at *New-York*, did the same.

On the 2d *April* 1803, the first attachment against the property of *Bird, Savage and Bird*, was lodged in this city. Divers others were lodged on the 15th, 16th and 23d. The bankruptcy of the firm in *London* was declared in *England* 12th *June* 1803. That of the house in *New-York* was declared on the 5th *December* following.

This bill is filed by *Harrison* the assignee, under the sealed deed of *December* 1802, and the unsealed instrument of 31st *January* 1803. He prays that this court will aid him in recovering the assigned property, and direct him in the application of it.

Answers and claims have been filed by many creditors of the bankrupts; by the assignees in *England*, and those under the commission in *New-York*. These compose, altogether, six classes of claimants.

1st. *Harrison*, as private assignee for particular creditors of *Robert Bird and Co.*

2d. The *United States*.

3d. The attaching creditors residing in the *United States*.

4th. Attaching creditors who reside abroad.

5th. Assignees under the commission at *New-York*.

6th. Assignees under the British commission.

In determining on these different and clashing interests, I feel much satisfaction in the assurances of all the parties, that the final decision will be made by the supreme court of the *United States*. This consideration induces me to proceed in the cause with less reluctance than I should otherwise do; and in the discussion

1807. cussion I shall first speak of the claim of the *United States* as entitled to priority over the rest.

Harrison
V.
Sterry et al. Fortunately, I can be at no loss upon this point; for the case of *Fisher and Blight*, in the supreme court, has, in my opinion, settled it.

They determined that the *United States* had a priority, in all cases whatsoever, and I should feel myself bound by this as the law, even if I entertained a different private opinion. But I readily concur; for the pleadings and evidence shew that *Bird, Savage and Bird*, had received large sums of money as public agents of our government, before any other lien on their property existed. This gave a clear equitable priority not only under the spirit, but also under the letter of the act of congress. It is objected that these bankrupts resided abroad; but this is not entitled to weight, for they could not, otherwise, have exercised their agency. Their *persons*, indeed, were not amenable to process from our courts, but their property in the *United States* was certainly liable. They were to all intents and purposes, receivers of public money, and are fully within the case of *Blight and Fisher* above mentioned. Nor do I think, as was contended, that any other agent of the *United States* could destroy their priority of claim by proving their debt under the commission of bankruptcy in *England*, voting for assignees, or laying an attachment against the property of the bankrupts.

The decision in *Blight and Fisher* made every step of this sort unnecessary; but does not convert such endeavours to support a right into arguments for its destruction.

As to *Harrison's* claim under the sealed deed, and unsealed paper, I think it cannot be supported to the extent contended for. *Robert Bird* had not, by the usage and custom of merchants, a power to execute a deed of this sort, and to sign and seal for his partners, without

without a more special authority. He could not have done so if he had been on the spot with the other partners; much less can he be allowed thus to charge them, at the distance of three thousand miles. Besides, between the date of these papers and the failure of *Bird and Savage*, there was only an interval of six days. If, therefore, it should be determined that this is the deed of *Bird and Savage*, it must be considered as executed in contemplation of bankruptcy, and, of course, bad. All that can pass under these instruments will be *Robert Bird's* share in the partnership stock comprehended in them.

1807.
Harrison
v.
Sterry et al.

The third class of claimants are the attaching creditors here. The attachment act of this state is founded on a broad basis, and no commission of bankruptcy in *England*, even before our separation from that country, was ever allowed to interfere with its operation. Nor can the commission, taken out at *New-York*, avail in the present case, because these attachments were laid before it was obtained. Two thirds, therefore, of the property mentioned in the deed and unsealed paper executed to *Harrison*, must be liable to the attaching creditors, according to priority in the lodging of their attachments.

As to the British creditors who have attached, our act makes no distinction between them, and those of the class I have just considered; nor shall I attempt to make any.

If any surplus should remain after satisfying the preceding claims, the assignees under the *New-York* commission will be entitled to receive it.

Let all costs of suit be paid out of the funds of the bankrupts remaining in the hands of the district attorney, after satisfaction of the claim of the *United States*. And let the registrar, acting as master, lay before the court a statement of the several demands as they will be affected by this decree.

John

1808.
January 11.

Moderate correction on board ship is justifiable; but deadly weapons, such as a cutlass, should only be used when a mutiny exists, or is threatened. A captain who encourages disorderly behaviour in his ship is the less excusable for inflicting unusual punishment for conduct arising, in some measure, out of that disorder.

John Jarvis v. Captain and Mate of the ship Claiborne.

UPON a careful consideration of the evidence in this case, there appear to have been great faults on both sides.

At the time the fray happened, the whole ship's company seems to have been more or less intoxicated; nothing else could have occasioned the captain and mate to make a ring on board, and permit two men to fight a battle on deck. Such a circumstance is sufficient to account for the insubordination of the crew, who ought rather to have been put in irons until they recovered their sober senses. At any rate nothing could justify captain *Sherwood* in drawing a cutlass; much less in using it to inflict a severe wound upon the actor, especially as he was then in irons. The law justifies moderate correction, and more than that had previously been inflicted by the mate, with his fist: from his apparent strength, the blows must have been severe. But the use of a weapon so deadly as a cutlass can be justified only by reasonable apprehension, or the actual existence of mutiny. Nothing of the sort appears here; the actor is charged only with disobedience of the captain's order to go forward; and the tumultuous scene that had so lately occurred on board, under the sanction of the captain himself, might, in a degree, excuse the sailor's inattention, and noncompliance.

An attempt was made to prove that the wound was received by an effort to seize the cutlass; but the whole account of the transaction renders this highly improbable; and the confinement in irons of the actor makes

makes it almost impossible. It appears, indeed, both from the evidence and a view of the wounded hand, that the actor will lose three of his fingers.

1808.

Jarvis

v.

Sherwood & Hammond.

Upon the whole, I consider the captain as highly blamable in every stage of the business, and I decree accordingly that he pay this sailor one hundred and fifty dollars, with all the expenses of the suit.

As to the mate, I shall not adjudge damages against him, as he punished only with his fist.

Moderate correction is often necessary towards seamen; the fist is generally used for the purpose of inflicting it; and bad consequences seldom follow. I have however, known one instance in which a blow with the fist occasioned death.

Sloan

1808.
January 18.

Sloan & M^{Millan} v. Ship A. E. I., Haley, master.

Hypotheca-
tion can only
be in a for-
ign port,
and under
circumstan-
ces of abso-
lute necessi-
ty, where
relief cannot
be had but
by pledging
the ship.

THIS ship, belonging to *Thomas Wright, James Bixby*, and the captain, sailed from hence to *Liverpool*, with a cargo belonging to *Sloan & M^{Millan}* (the actors in this cause,) the freight of which amounted to 1878*l.* sterling.

The cargo having been delivered, it was found necessary to repair the ship. The actors advanced the money for this purpose, and a further sum to the captain, for all which the latter drew a bill of 1362*l.* sterling. He was, himself, *half owner* of the vessel; and the bill was drawn on *Wright*, another *part owner*, and on *Nathaniel Bixby*, who appears to have had an interest in the cargo. *James Bixby*, the other part owner, is not noticed in the bill, which was protested on the 9th of December last. On the 23d of that month, *Haley* signed a paper, in *Charleston*, purporting to be an hypothecation of the ship for 938*l.* 15*s.* and states therein that the hypothecation had been dispensed with in *Liverpool*, from a persuasion that the money advanced would be repaid on the ship's arrival here.

The claimants, in their plea and answer, state that *Haley* did not apply to the libellants to advance money for these repairs, till after the ship had discharged her outward bound cargo, and they, as consignees, had received the freight.

The judge said that the principles of the law of hypothecation were fully laid down in *Hopkinson's Rep.* 163 to 199, inclusive. That he had been guided by those principles in several former decisions, and should continue to be so, till a decision of the supreme court

court of the *United States* should furnish a different 1808.
precedent.

In this case the paper pretending to be a deed of hypothecation had not been entered into until the vessel had got back to this port, and the bill drawn on the owners had been protested. No distress on the part of the captain had been proved; money was advanced as he wanted it, evidently on personal credit, and not on that of the ship.

The libel was dismissed with costs.

United

1808.

February 1.

Forfeiture under the act of congress prohibiting the importation of negroes after 1st January 1808, may be remitted by this court in cases of extreme hardship.

United States v. Schooner Kitty.

THIS suit is instituted by captain *M'Neil* of the revenue cutter *Gallatin*, against the schooner *Kitty*, for a breach of the first and seventh sections of the act of congress passed 2d *March* last, entitled "An act to prohibit the importation of slaves into any port or place within the jurisdiction of the *United States* after the 1st of *January* 1808."

It appeared in evidence, that the *Kitty* sailed from *Charleston* on the 19th *November* 1806, bound to the coast of *Africa*. She arrived there on the 1st *January* following, at which time her crew consisted of the captain, two mates, one steward, and seven seamen. The second mate and one seaman died in *February*; another seaman died in *August* following. The steward ran away, and the first mate was discharged as an incorrigible drunkard: so that, in the month of *August*, the captain only and five of the crew remained. At this time they had purchased no more than thirty-two slaves; and such was the scarcity of provisions on the coast, that, till the beginning of *November*, they were threatened with famine. In *July*, the captain was taken ill, and continued so till the vessel sailed. In *August*, the ship's papers were seized by the governor, and detained for a fortnight. In *September* a report of war with *Great Britain* obliged the vessel to run up the river to avoid being captured. In *October*, only two of the crew were fit for duty, and the vessel was so leaky as to be three weeks under repair; provisions for their return could not be procured till *November*; on the 16th of that month she sailed, and on the 16th *January* 1808, was seized in *Stono Inlet*, near *Charleston*, by the captain of the revenue cutter.

The

The libel prays condemnation of the vessel, as 1808.
coming within the act of congress. The owners con- United States
tend that this case, though within the letter, is not Sch'r. Kitty.
within the spirit of the act.

I have considered the evidence and circumstances of this cause with attention. It is not denied that the voyage was a legal one in its inception, and continued so for nearly fourteen months afterwards. The act by which the trade was made illegal was not passed till a long time after this vessel sailed; and there is no proof that knowledge of it ever reached the captain, till his return. But if the act had been known to him, unavoidable accident and invincible necessity prevented his sailing sooner. As it was, he might have got here in six weeks, which the prosecutor himself allowed to be no uncommon passage; but head winds and a winter's passage detained him a fortnight longer.

If ever there was a case of hardship, occasioned by no fault of the party, this is one; and it is justly and humanely observed by sir *William Scott* (*Robinson*, 221) that "Laws which would not admit an equitable construction, applicable to the inevitable misfortunes or necessities of men; or the exercise of a fair discretion under difficulties; could not be framed for human societies."

By this principle I shall be guided in the present case, more especially as the act of congress upon which the suit is grounded expressly gives the court a discretionary power in *extreme cases*, of which this is surely one.

I, therefore, dismiss the suit; but order that all the costs be paid by the claimant; for captain *M'Neil*, in this seizure and prosecution, did no more than obey a positive law, the directions of which he would have been criminal in neglecting.

Carey

Carey et al. v. Schooner Kitty and Owners.

1808.

March 25.

The owners
of a vessel
are liable for
wages if the
vessel prove
insufficient
to pay them.

NO case including this question has been brought before me hitherto. I have fully considered the arguments that have been adduced, and have looked into the precedents of this court, as well as those in *Clarke's Praxis*, a book of high authority. I find that before, and since the American revolution, suits like the present have always been sustained. The arguments adduced to the contrary do not appear to me sufficient to overset the old practice of the court. I decree, therefore, that the process prayed for against the *owners* of the *Kitty* be granted, if the *vessel* should not prove to be sufficient for payment of seamen's wages.

Carey

Carey et al. v. Schooner Kitty and Owners.

1808.
April.

TWO questions have been argued on behalf of the libellants in this cause.

1st. Whether wages shall be paid for *Martin Dear*, (who died, during the voyage, on the coast of Africa) beyond the time of his death.

2d. Whether any and what deduction ought to be made from the wages of the rest of the crew, by way of contribution for the loss of a negro slave belonging to the owners, who ran away from the vessel at *Sierra Leone*, and remained there.

The first point has never been contended for before me till now; the uniform practice having been to allow wages to the time of the seaman's death, and no longer. This has been acquiesced in till some late decisions in the district court of *Pennsylvania*, determined by the judge of that district, and confirmed by judge *Washington* in the circuit court. (See *Peters's Reports* 1. 155.) Without questioning these authorities at present, it may be sufficient to observe that the courts of one state may be allowed to differ from those of another. In this state, the records of the court of admiralty shew that wages of seamen have never been allowed beyond the time of their death. The marine ordinances, quoted on this occasion, vary. The laws of *Oleron*, *Wisbuy*, and the *Hanse Towns*, allow wages to the end of the voyage: those of *France*, collected by *Vaquin*, only to the time of death. Reasons that existed when those laws were framed, may not be applicable in the present state of commerce. Voyages were then much shorter, seldom extending beyond the *Mediterranean*, the *Baltic*, the *Adriatic*, and the coasts of the *Atlantic*. Seamen engaged themselves for two or three

1808. three months, out and home, and, in case of death before they returned, the utmost sum claimable by their representatives, was trifling in comparison of what may be due in these days, when voyages are not unfrequently extended to one, or two years. Will it, then, be expected that the wages of a seaman who dies at the end of the first month shall be recoverable for the period of a whole year? I think not.

It may also be observed that contracts with seamen are merely personal, no mention being made in them of executors, administrators, or assigns. Even in *England*, the right of these last to *any* wages does not seem to be settled; *Abbot* states it as doubtful. It is much to be desired that some general rule be established by congress, or by the decision of the supreme court of the *United States*: till then, I see no good reason to depart from the former practice in this court, both before and since the revolution. I decree, therefore, that the wages of *Martin Dear* be allowed up to the time of his death, which, from the evidence produced, happened nearly three months before the vessel sailed on her return voyage.

As to the second point, the doctrine of contribution is tolerably well settled, that where damage happens to vessel or cargo, mariners must bear their share of the loss. For, freight is the mother of wages, and if embezzlement cause a deduction from the freight, it is reasonable that they who are to be paid from it, should lose in proportion.

In the present case, a slave of the owner, who is entered in the ship's articles as one of the seamen, in the station of cook, deserts from the vessel in a foreign port, and obtains his freedom by the laws of that country. For this loss the owner claims a contribution from the wages of the crew. But I do not see how the general principle of contribution can apply to this case. This man was no part of the vessel or cargo; he was shipped

shipped as a seaman, and can never be so considered 1808.
as to authorize the present demand. But it was said ^{Carey et al.} that disobedience of orders occasioned the loss; that Sch'r Kitty.
such neglect of duty amounted to a breach of the con-
tract in the articles, and that, on that score, a deduc-
tion should be made. There was, however, no evi-
dence of any orders being given to the crew. The
mate, indeed, had directions not to permit any of the
crew to go ashore at night; but there is no proof that
he gave orders to that effect, and, as he did not return
with the ship, he cannot be examined to this point.
The discipline on board of this vessel appears to have
been very relaxed; there seems to have been no watch
appointed for the night when this negro made his es-
cape; if there was, no persons are named as having
been upon that watch, and it is possible that the negro
himself may have been upon that duty. If so, how can
blame attach to the others?

Upon the whole, I see no cause to make any de-
duction from the wages of the crew on this account;
and I decree accordingly.

2'K

Peter

Peter Martins v. Edward Ballard.

Persons confined in jail for torts and trespasses do not come within the provisions of congress, or the act of debt.

congress, or that of this state, for relief of insolvent debtors. It has been objected that this act relates solely to persons confined for *debt on execution*; and that *Ballard* does not come within that description. The law of this *state* for the relief of insolvent debtors excepts such persons as are in confinement for torts and trespasses; and it has been contended that the exception ought to prevail in this instance.

That such is the proper construction of the *state* law is admitted by the opposite counsel; but they assert that it cannot apply here. That the act of congress alone must guide the present decision, and that, in it, *all* civil actions are comprehended. That it must be construed favourably, being *in favorem libertatis*. That confinement of debtors is contrary to *every* principle of humanity. That the claim against *Ballard*, for which he stands imprisoned, is by operation of law become, and must be considered as, a debt, within the meaning and intention of the law of congress.

As this is a case of first impression, I have considered it with much attention. In order to determine it, we must look to the origin of the suit, and see in what predicament *Ballard* now stands.

The suit was instituted, originally, for damages, under the treaty with the *United Netherlands*. *Ballard* was taken into custody on a warrant out of this court, and gave bond with sufficient security to abide the court's decision.

Previously

Previously to a final decision, his surety, or bail, Peter Martins applied here for leave to surrender back the defendant ^{v.} E. Ballard. to the custody of the marshal; and this was done accordingly. *Ballard* now applies for relief under this act of congress.

It cannot be doubted that the act was intended solely for the relief of persons imprisoned for debt. It speaks of such as may be in confinement "on executions issuing from any court of the *United States* for satisfaction of judgments in any *civil actions*." If this suit had been for debt, or on contract, I should have had no doubt upon the point; but, by reference to the treaty with the *United Netherlands*, we find that this suit originated in a violation of that treaty expressly guarded against thereby. (See 13th article of that treaty.)

We must, therefore, consider how far cases like the present could have been contemplated by congress, when they passed this act. Could they mean to discharge such offenders as *Ballard*; against whom the treaty expressly declares that their *persons*, as well as their *goods*, shall be answerable for any violation of its provisions? I am of opinion that the clause of the act relates not to him. To discharge him under the present application would, I think, shew a misconstruction of the law, and amount, on my part, to an infringement of the treaty.

Let the application be dismissed.

Flinn

A vessel with slaves on board but no white person, considered as derelict, and one third given as salvage. The captain and owner's share thereof declared forfeited, for fraudulent concealment of two of the negroes. Such share enures to the owners of the derelict.

Finn et al. v. Leander and fifty four Slaves.

THE brig *Norfolk*, on the 19th of March last, 250 miles from this port, to which she was bound, fell in with the *Leander*; and on the afternoon of the third day arrived with her in *Charleston*.

The *Leander* had 56 slaves on board, but no white person. In the evening of the 19th two of the slaves died. The wind was east, and the ship was standing eastward. From her manner of steering, and from a piece of a torn sail which looked like a white flag, she appeared to be in distress. On approaching the vessel, the negroes invited them to come on board, and an interpreter was afterwards found who explained their wish more clearly. Captain *Marson* then agreed to send on board five hands, with nearly one half of his provisions. The negroes told these men that all the white people had died; but, after their arrival in port, part of a journal was found by which it appeared that the crew had been driven, or thrown, overboard; two had been killed. The negroes said that eight or ten vessels had fallen in with them, without assisting them. That they had been boarded by one, who took away six or seven slaves, under a promise of supplying the rest with provisions; which, however, was not done. It appeared that the *Leander* was tight, and her rigging good, but she had no sails. It was evident from the last entry in the logbook that no reckoning had been kept for a month; from whence it was reasonably inferred that the negroes had been for that time in possession.

Such is the evidence given by the claimants; and the nature of the case admits no better. It seems credible,

dible, and I must act upon it, in fixing the compensation due to the crew of the *Norfolk*. Flan et al.
v.
Leander.

There being no white persons on board, and the slaves being regarded as cargo, I must consider the *Leander* as derelict: but she does not seem to have been in any immediate danger. She was in tight condition, had on deck provisions for eight or ten days, and more in her hold.

They had fallen in with many vessels, the *Norfolk* actually took charge of them, and would have been assisted, if necessary, by a schooner called the *Success* bound to *Boston*: the services of the latter were declined, because they were not wanted. Indeed, from the prevalence of easterly winds at this season, it is highly probable that the *Leander* would have drifted on shore. This happened in the case of the *Priscilla*, and in that of the *St. Peter*; both within the knowledge of this court. The *Leander* actually arrived in port on the third day after she fell in with the *Norfolk*. No tempestuous weather seems to have threatened the vessel or the slaves, within that space of time.

Nevertheless, considerable service was rendered; and it has been proved that the ship and cargo are worth nearly sixteen thousand dollars.

I shall under all the circumstances adjudge one third of the net proceeds of this property by way of compensation. In other cases of derelict, attended with greater danger and exertion, I have sometimes given one half. But this is no *general rule*; every case must be judged of according to circumstances.

It appeared, in a subsequent proceeding, that the captain and owners of the *Norfolk* had concealed two slaves, part of this cargo; from which it was contended that they had forfeited their share of salvage; and that the forfeiture enured to the owners of the *Leander*,
not

Flann et al. not to the other salvors. The judge said that the case of the *Blaireau*, (see *Cranch's Reports*) was conclusive upon both points, and decreed accordingly a forfeiture of that part of the salvage, to the owners of the *Leander*.

John Frederick et al. v. Brig Fanny, Captain Ormond.

If any part
of the cargo
be missing,
all the sea-
men shall
contribute to
make it
good, unless
the guilt can
be proved
upon a parti-
cular person,
or persons.

THE question in this case is, whether all the seamen shall be liable, proportionally, to make good the value of certain articles making part of the cargo, and missing.

It was proved that *William Harriott*, one of the seamen, had been detected with part of the stolen goods, and that he alone was liable, no proof appearing against the others. It was admitted that all would have been chargeable, if none, in particular, could have been criminated.

One hundred pieces of nankeen were missing, of which only three were found upon *Harriott*. The rest of the crew must necessarily have been privy to, or concerned in the loss of the remainder.

I decree, therefore, that they all contribute, *pro rata*, to make up this loss.

Consul

IN THE CIRCUIT COURT.

Consul of Spain v. Consul of Great Britain.

THE bill states that the Spanish felucca *La Nostra Belligerents* have no right unless secured by treaty, to sell their prizes in a neutral port. The neutral government may grant permission, but ought not to do so, unless all the powers at war can be put upon an equal footing.

Signora, the property of the subjects of his most catholic majesty, was discovered, chased, attacked, fired upon and brought in here by his Britannic majesty's ship of war *Meleager*, on the open seas, and was sent into this port on the tenth day of *May* instant as a prize to his Britannic majesty's said ship of war *Meleager*, and advertised for sale in the Gazette of this city. That *Don Diego Morphy*, consul of his most catholic majesty, conceives that the sale of the said prize, in any of the ports of the *United States*, is contrary to the present state of amity subsisting between his most catholic majesty and the *United States*, is unauthorized by the government of the *United States*, would be a breach of and violation from their neutrality, and in contravention of the laws of nations, and therefore prays an injunction to stop the sale.

On the part of the defendant, it was objected, that the intended sale is neither contrary to any existing treaty, or regulation of the executive of the *United States*, or law of congress, or of nations: and that the sale of prizes made by the British from their enemies, the Spaniards, may lawfully take place in the *United States*, till our government does (as it may) by treaty or otherwise, prevent the same.

The judiciary power cannot interpose its authority to

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v.*

*Consul of
Great Britain.*

to enjoin a sale, until the executive shall positively interdict the same.

On the part of the complainant, it was answered, that where no *right* to sell is granted by treaty, nor express *permission* to sell is shewn, that the court of equity is the proper court to restrain the party. That a right to sell cannot be supposed to pass by implication, as it goes to a cession of sovereignty. That to permit a sale would be a breach of neutrality; inasmuch as both the belligerent powers ought to be placed on an equal footing in all respects.

The chief justice delivered the opinion of the court to the following purport.

" The right to sell cannot be claimed by treaty. If " it exists at all, it rests on permission. Without doubt, " a neutral nation may permit a belligerent to sell, " without violating its neutrality: treaties apart, it is " wholly discretionary. The sovereignty of a neutral " power authorizes the exercise of such discretion. " Between aiding commerce and permitting the sale " of prizes, there is a great difference. Silence, in the " ordinary cases of commerce, may be considered as " a consent to it; but the sale of prizes must be by " *positive permission*. If permitted to sell, without a " previous decision by the court of the capturing " power as to the legality of the prize, there is danger " of fraud, and even of piracy. I do not say that a " condemnation is necessary, but all nations are interested that it should take place before a sale is made. " The sale of prizes ensnares, and insensibly leads to " a departure from strict neutrality; for this reason, a " neutral nation should first give its consent, by treaty, " or otherwise. Here there is no treaty that authorizes " the sale, nor is any permission of the government " shewn. An attempt, therefore, to sell is inconsistent " with the sovereignty of the *United States*. What we
" are

“ are at liberty to grant as a favour must be granted
“ equally; but, by treaty with *Great Britain* we cannot
“ grant this favour to the *Spaniards*; therefore, we
“ ought not to grant it to the *British*.
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“ As the court does not undertake to decide what
“ the executive ought to do, I wish to frame the de-
“ cree so as to permit an application to that branch of
“ the government. Let there be an injunction to stop
“ the sale, till further order of this court, unless per-
“ mission be sooner obtained *from the president of the*
“ *United States.*”

*United States v. Nash, alias Robins.**

Prisoner delivered up, upon affidavits, as guilty of murder on board a British ship of war, on the high seas: according to 27th article of treaty with Great Britain.

THE prisoner is brought before me by writ of habeus corpus, from which, and from two affidavits filed with the clerk of this court, it appears that the prisoner is charged with having committed murder on board of a ship of war belonging to his Britannic majesty, on the high seas. Requisition has been made by the British minister that he be delivered up by virtue of the 27th article of the treaty of amity between the *United States* and *Great Britain*; and as there is sufficient evidence of criminality to justify his apprehension and commitment for trial, and justice may be more fully done if the prisoner be tried where the witnesses reside, or their evidence may be better procured, I do (in consideration of the circumstances, and at the particular request of the president of the *United States* [Mr. John Adams]) order that the prisoner *Thomas Nash*, alias *Jonathan Robins*, be delivered over by the marshal of this court to *Benjamin Moodie*, consul of his Britannic majesty, agreeably to the 27th section of the treaty aforesaid.

* Speech of the honourable *John Marshall*, delivered in the house of representatives of the *United States*, on the resolutions of the honourable *Edward Livingston*, relative to *Thomas Nash*, alias *Jonathan Robins*.

Mr. MARSHALL said, believing, as he did most seriously, that in a government constituted like that of the *United States*, much of the public happiness depended, not only on its being rightly administered, but on the measures of administration being rightly understood: on rescuing public opinion from those numerous prejudices with which so many causes might combine to surround it: he could not but have been highly gratified with the very eloquent, and what was still more valuable, the very able, and very correct argument, which had been delivered by

the gentleman from *Delaware* (*Mr. Bayard*) against the resolutions now under consideration. He had not expected that the effect of this argument would have been universal, but he had cherished the hope, and in this he had not been disappointed, that it would be very extensive. He did not flatter himself with being able to shed much new light on the subject; but, as the argument in opposition to the resolutions had been assailed, with considerable ability, by gentlemen of great talents, he trusted the house would not think the time misapplied, which would be devoted to the reestablishment of the principles contained in that argument, and to the refutation of those advanced in opposition to it. In endeavouring to do this, he should notice the observations in support of the resolutions, not in the precise order in which they were made, but as they applied to the different points he deemed it necessary to maintain, in order to demonstrate, that the conduct of the executive of the *United States* could not justly be charged with the errors imputed to it by the resolutions.

His first proposition, he said, was that the case of *Thomas Nash*, as stated to the president, was completely within the twenty-seventh article of the treaty of amity, commerce, and navigation, entered into between the *United States* of *America* and *Great Britain*.

He read the article, and then observed: The *causus fœderis* of this article occurs, when a person, having committed murder or forgery within the jurisdiction of one of the contracting parties, and having sought an asylum in the country of the other, is charged with the crime, and his delivery demanded, on such proof of his guilt as according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed.

The case stated is, that *Thomas Nash*, having committed a murder on board a British frigate, navigating the high seas under a commission from his Britannic majesty, had sought an asylum within the *United States*, and on this case his delivery was demanded by the minister of the king of *Great Britain*.

It is manifest that the case stated, if supported by proof, is within the letter of the article, provided a murder committed in a British frigate, on the high seas, be committed within the jurisdiction of that nation.

That such a murder is within their jurisdiction, has been fully shewn by the gentleman from *Delaware*. The principle is, that the jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world. The laws of a nation are rightfully obligatory on its own citizens in every situation,

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United States situation, where those laws are really extended to them. This principle is founded on the nature of civil union. It is supported every where by public opinion, and is recognized by writers on the law of nations. *Rutherford* in his second volume (p. 180) says, "The jurisdiction which a civil society has over the persons of its members, affects them immediately, whether they are within its territories or not."

This general principle is especially true, and is particularly recognized, with respect to the fleets of a nation on the high seas. To punish offences committed in its fleet, is the practice of every nation in the universe; and consequently the opinion of the world is, that a fleet at sea, is within the jurisdiction of the nation to which it belongs. *Rutherford* (vol. ii. p. 491) says, "There can be no doubt about the jurisdiction of a nation over the persons, which compose its fleets, when they are out at sea, whether they are sailing upon it, or are stationed in any particular part of it."

The gentleman from *Pennsylvania*, (Mr. Gallatin) though he has not directly controverted this doctrine, has sought to weaken it, by observing, that the jurisdiction of a nation at sea could not be complete even in its own vessels; and in support of this position he urged the admitted practice of submitting to search for contraband: a practice not tolerated on land, within the territory of a neutral power. The rule is as stated; but is founded on a principle which does not affect the jurisdiction of a nation over its citizens or subjects in its ships. The principle is, that in the sea, itself, no nation has any jurisdiction. All may equally exercise their rights, and consequently the right of a belligerent power to prevent aid being given to his enemy, is not restrained by any superior right of a neutral in the place. But if this argument possessed any force, it would not apply to national ships of war, since the usage of nations does not permit them to be searched.

According to the practice of the world then, and the opinions of writers on the law of nations, the murder committed on board a British frigate navigating the high seas, was a murder committed within the jurisdiction of the British nation.

Although such a murder is plainly within the letter of the article, it has been contended not to be within its just construction; because, at sea, all nations have a common jurisdiction, and the article correctly construed, will not embrace a case of concurrent jurisdiction.

It is deemed unnecessary to controvert this construction, because the proposition, *that the United States had no jurisdiction over*

over the murder committed by Thomas Nash, is believed to be United States
completely demonstrable.

It is not true that all nations have jurisdiction over all offences
committed at sea. On the contrary, no nation has any jurisdiction
at sea, but over its own citizens or vessels, or offences against
itself. This principle is laid down in 2 *Ruth.* 488. 491.

Nash, alias
Roberts.

The American government has on a very solemn occasion,
avowed the same principle. The first minister of the French re-
public asserted and exercised powers of so extraordinary a na-
ture, as unavoidably to produce a controversy with the *United States.* The situation in which the government then found itself
was such, as necessarily to occasion a very serious and mature
consideration of the opinions it should adopt. Of consequence,
the opinions then declared, deserve great respect. In the case
alluded to, Mr. *Genet* had asserted the right of fitting out priva-
teers in the American ports, and of manning them with Ameri-
can citizens, in order to cruise against nations with whom
America was at peace. In reasoning against this extravagant
claim, the then secretary of state, in his letter of the 17th of
June, 1793, says: "For our citizens then to commit murders and
"depredations on the members of nations at peace with us, or
"to combine to do it, appeared to the executive and to those
"whom they consulted, as much against the laws of the land, as
"to murder or rob, or combine to murder or rob, its own citi-
"zens; and as much to require punishment, if done, within their
"limits, where they have a territorial jurisdiction, or on the high
"seas, where they have a *personal jurisdiction*, that is to say, one
"which reaches *their own citizens only*; this being an *appropriate*
"part of each nation, on an element where all have a common
"jurisdiction."

The well considered opinion then of the American govern-
ment on this subject is, that the jurisdiction of a nation at sea is
"*personal*," reaching its "*own citizens only*," and that this is
"*the appropriate part of each nation*" on that element.

This is precisely the opinion maintained by the opposers of
the resolutions. If the jurisdiction of *America* at sea be personal,
reaching its own citizens only; if this be its appropriate part,
then the jurisdiction of the nation cannot extend to a murder
committed by a British sailor, on board a British frigate navi-
gating the high seas, under a commission from his Britannic
majesty.

As a further illustration of the principle contended for, sup-
pose a contract made at sea, and a suit instituted for the recovery
of money which might be due thereon. By the laws of what na-
tion would the contract be governed? The principle is general,
that

United States that a personal contract follows the person, but is governed by the law of the place where it is formed. By what law then would such a contract be governed? If all nations had jurisdiction over the place, then the laws of all nations would equally influence the contract; but certainly no man will hesitate to admit, that such a contract ought to be decided according to the laws of that nation, to which the vessel or contracting parties might belong.

Suppose a duel attended with death, in the fleet of a foreign nation, or in any vessel which returned safe to port, could it be pretended that any government on earth, other than that to which the fleet or vessel belonged, had jurisdiction in the case; or that the offender could be tried by the laws, or tribunals, of any other nation whatever.

Suppose a private theft by one mariner from another, and the vessel to perform its voyage and return in safety, would it be contended that all nations have equal cognizance of the crime, and are equally authorized to punish it?

If there be this common jurisdiction at sea, why not punish desertion from one belligerent power to another, or correspondence with the enemy, or any other crime which may be perpetrated? A common jurisdiction over all offences at sea, in whatever vessel committed, would involve the power of punishing the offences which have been stated. Yet all gentlemen will disclaim this power. It follows then that no such common jurisdiction exists.

In truth the right of every nation to punish, is limited, in its nature, to offences against the nation inflicting the punishment. This principle is believed to be universally true.

It comprehends every possible violation of its laws on its own territory, and it extends to violations committed elsewhere by persons it has a right to bind. It extends also to general piracy.

A pirate under the law of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. Any act which denotes this universal hostility, is an act of piracy. Not only an actual robbery therefore, but cruizing on the high seas without commission, and with intent to rob, is piracy. This is an offence against all and every nation, and is therefore alike punishable by all. But an offence which in its nature affects only a particular nation, is only punishable by that nation.

It is by confounding general piracy with piracy by statute, that indistinct ideas have been produced, respecting the power to punish offences committed on the high seas.

A statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute, and such offence

will

will be punishable by that nation. But piracy under the law of United States
nations, which alone is punishable by all nations, can only consist
in an act which is an offence against all. No particular nation
can increase or diminish the list of offences thus punishable.

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Robins

It had been observed by his colleague (Mr. *Nicholas*) for the purpose of shewing that the distinction taken on this subject by the gentleman from *Delaware* (Mr. *Bayard*) was inaccurate, that any vessel robbed on the high seas, could be the property only of a single nation, and being only an offence against that nation, could be, on the principle taken by the opposers of the resolutions, no offence against the law of nations: but in this his colleague had not accurately considered the principle. As a man, who turns out to rob on the highway, and forces from a stranger his purse with a pistol at his bosom, is not the particular enemy of that stranger, but alike the enemy of every man who carries a purse, so those, who, without a commission, rob on the high seas, manifest a temper hostile to all nations, and therefore become the enemies of all. The same inducements which occasion the robbery of one vessel, exist to occasion the robbery of others, and therefore the single offence is an offence against the whole community of nations, manifests a temper hostile to all, is the commencement of an attack on all, and is consequently, of right, punishable by all.

His colleague had also contended that all the offences at sea, punishable by the British statutes from which the act of congress was in a great degree copied, were piracies at common law, or by the law of nations, and as murder is among these, consequently murder was an act of piracy by the law of nations, and therefore punishable by every nation. In support of this position he had cited 1 *Hawk. P. C.* 267. 271. 3 *Inst.* 112, and 1 *Woodison* 140.

The amount of these cases is, that no new offence is made piracy by the statutes; but that a different tribunal is created for their trial, which is guided by a different rule, from that which governed, previous to those statutes. Therefore, on an indictment for piracy, it is still necessary to prove an offence which was piracy before the statutes. He drew from these authorities a very different conclusion from that which had been drawn by his colleague. To shew the correctness of his conclusion, it was necessary to observe, that statute did not indeed change the nature of piracy, since it only transferred the trial of the crime to a different tribunal, where different rules of decision prevailed; but having done this, other crimes committed on the high seas, which were not piracy, were made punishable by the same tribunal; but certainly this municipal regulation could not be considered

United States v. Nash, alias Robins. All the gentlemen who have spoken in support of the resolutions have contended that the case of *Thomas Nash* is within the purview of the act of congress, which relates to this subject, and is, by that act, made punishable in the American courts. That is, that the act of congress designed to punish crimes committed on board a British frigate.

Nothing can be more completely demonstrable than the untruth of this proposition.

It has already been shewn, that the legislative jurisdiction of a nation extends only to its own territory, and to its own citizens wherever they may be. Any general expression in a legislative act must, necessarily, be restrained to objects within the jurisdiction of the legislature passing the act. Of consequence, an act of congress can only be construed to apply to the territory of the *United States*, comprehending every person within it, and to the citizens of the *United States*.

But independent of this undeniable truth, the act itself affords complete testimony of its intention and extent. (See *Laws of the U. S.* vol. 1. p. 100.)

The title is, "An act for the punishment of certain crimes "against the *United States*." Not against *Britain*, *France*, or the world; but singly "against the *United States*."

The first section relates to treason, and its objects are "any "person or persons owing allegiance to the *United States*." This description comprehends only the citizens of the *United States*, and such others as may be on its territory or in its service.

The second section relates to misprision of treason, and declares, without limitation, that any person or persons, having knowledge of any treason, and not communicating the same, shall be guilty of that crime. Here then is an instance of that limited description of persons in one section, and of that general description in another, which has been relied on to support the construction contended for by the friends of the resolutions. But will it be pretended that a person can commit misprision of treason, who cannot commit treason itself? That he would be punishable for concealing a treason, who could not be punished for plotting it? Or can it be supposed that the act designed to punish an Englishman or a Frenchman, who, residing in his own country, should have knowledge of treasons against the *United States*, and should not cross the *Atlantic* to reveal them?

The same observations apply to the sixth section, which makes "any person or persons" guilty of misprision of felony, who having knowledge of murder or other offences enumerated in that section, should conceal them. It is impossible to apply this to a foreigner,

foreigner, in a foreign land, or to any person not owing allegiance to the *United States*.

The eighth section, which is supposed to comprehend the case, after declaring, that if any person or persons shall commit murder on the high seas, he shall be punishable with death, proceeds to say, that if any captain or mariner shall piratically run away with a ship or vessel, or yield her up voluntarily to a pirate, or if any seaman shall lay violent hands on his commander, to prevent his fighting, or shall make a revolt in the ship, every such offender shall be adjudged a pirate, and a felon.

v.
Nash, alias
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The persons who are the objects of this section of the act are all described in general terms, which might embrace the subjects of all nations. But is it to be supposed, that if, in an engagement between an English and a French ship of war, the crew of the one or the other should lay violent hands on the captain and force him to strike, that this would be an offence against the act of congress punishable in the courts of the *United States*? On this extended construction of the general terms of the section, not only the crew of one foreign vessel forcing their captain to surrender to another would incur the penalties of the act, but if, in the late action between the gallant *Turkton* and a French frigate, the crew of that frigate had compelled the captain to surrender while he was unwilling to do so, they would have been indictable as felons in the courts of the *United States*. But surely the act of congress admits of no such extravagant construction.

His colleague, Mr. *Marshall* said, had cited and particularly relied on the ninth section of the act. That section declares, that if a citizen shall commit any of the enumerated piracies, or any act of hostility on the high seas against the *United States*, under colour of a commission from any foreign prince or state, he shall be adjudged a pirate, felon and robber, and shall suffer death.

This section is only a positive extension of the act to a case, which might otherwise have escaped punishment. It takes away the protection of a foreign commission from an American citizen, who on the high seas robs his countrymen. This is no exception from any preceding part of the law, because there is no part which relates to the conduct of vessels commissioned by a foreign power; it only proves that, in the opinion of the legislature, the penalties of the act could not, without this express provision, have been incurred by a citizen holding a foreign commission.

It is then most certain, that the act of congress does not comprehend the case of a murder committed on board a foreign ship of war.

The

United States The gentleman from *New-York* has cited 2 *Woodison* 426 to shew that the courts of *England* extend their jurisdiction to piracies committed by the subjects of foreign nations.

Nash, alias
Robins. This has not been doubted. The case from *Woodison* is a case of robberies committed on the high seas by a vessel without authority. There are ordinary acts of piracy, which, as has been already stated, being offences against all nations, are punishable by all. The case from 2 *Woodison*, and the note cited from the same book by the gentleman from *Delaware*, are strong authorities against the doctrines contended for by the friends of the resolutions.

This has also been contended that the question of jurisdiction was decided at *Trenton*, by receiving indictments against persons there arraigned for the same offence, and by retaining them for trial after the return of the habeas corpus.

Every person in the slightest degree acquainted with judicial proceedings knows that an indictment is no evidence of jurisdiction; and that in criminal cases, the question of jurisdiction will seldom be made but by arrest of judgment after conviction.

The proceedings after the return of the habeas corpus only prove, that the case was not such a case as to induce the judge immediately to decide against his jurisdiction. The question was not free from doubt, and therefore might very properly be postponed until its decision should become necessary.

It has been argued by the gentleman from *New-York*, that the form of the indictment is, itself, evidence of a power in the court to try the case. Every word of that indictment, said the gentleman, gives the lie to a denial of the jurisdiction of the court.

It would be assuming a very extraordinary principle indeed to say, that words inserted in an indictment for the express purpose of assuming the jurisdiction of a court should be admitted to prove that jurisdiction. The question certainly depended on the nature of the fact, and not on the description of the fact. But as an indictment must necessarily contain formal words in order to be supported, and as forms often denote what a case must substantially be to authorize a court to take cognizance of it, some words in the indictments, at *Trenton*, ought to be noticed. The indictments charge the persons to have been within the peace and the murder to have been committed against the peace of the *United States*. These are necessary averments, and, to give the court jurisdiction, the fact ought to have accorded with them. But who will say that the crew of a British frigate on the high seas are within the peace of the

United

United States, or a murder committed on board such a frigate United States against the peace of any other than the British government.

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It is then demonstrated that the murder with which *Thomas Nash* was charged was not committed within the jurisdiction of the *United States*, and, consequently, that the case stated was completely within the letter and the spirit of the twenty-seventh article of the treaty between the two nations. If the necessary evidence was produced, he ought to have been delivered up to justice. It was an act to which the American nation was bound by a most solemn compact. To have tried him for the murder would have been mere mockery. To have condemned and executed him, the court having no jurisdiction, would have been murder: to have acquitted and discharged him would have been a breach of faith and a violation of national duty.

But it has been contended that although *Thomas Nash* ought to have been delivered up to the British minister, on the requisition made by him in the name of his government, yet the interference of the president was improper.

This Mr. *Marshall* said led to his second proposition, which was

That the case was a case for executive and not judicial decision. He admitted implicitly the division of powers stated by the gentleman from *New-York*, and that it was the duty of each department to resist the encroachments of the others.

This being established, the inquiry was, to what department was the power in question allotted?

The gentleman from *New-York* had relied on the second section of the third article of the constitution, which enumerates the cases to which the judicial power of the *United States* extends, as expressly including that now under consideration. Before he examined that section, it would not be improper to notice a very material misstatement of it made in the resolutions offered by the gentleman from *New-York*. By the constitution, the judicial power of the *United States* is extended to all *cases in law and equity* arising under the constitution, laws and treaties of the *United States*; but the resolutions declare the judicial power to extend to *all questions* arising under the constitution, treaties and laws of the *United States*. The difference between the constitution and the resolutions was material and apparent. A case in law or equity was a term well understood, and of limited significance. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the *United States*,

United States, it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated could exist no longer, and the other departments would be swallowed up by the judiciary. But it was apparent that the resolutions had essentially misrepresented the constitution. He did not charge the gentleman from *New-York* with intentional misrepresentation; he would not attribute to him such an artifice in any case, much less in a case where detection was so easy and so certain. Yet this substantial departure from the constitution, in resolutions affecting substantially to unite it, was not less worthy of remark for being unintentional. It manifested the course of reasoning by which the gentleman had himself been misled and his judgment betrayed into the opinions those resolutions expressed.

By extending the judicial power to all *cases in law and equity*, the constitution had never been understood to confer on that department any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.

A case in law or equity proper for judicial decision may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court. As under the fourth or sixth article of the treaty of peace with *Great Britain*, or under those articles of our late treaties with *France*, *Prussia* and other nations, which secure to the subjects of those nations their property within the *United States*: or, as would be an article which, instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable by the laws and in the courts of the *United States*. But the judicial power cannot extend to political compacts: as, the establishment of the boundary line between the American and British dominions; the case of the late guarantee in our treaty with *France*; or the case of the delivery of a murderer under the twenty-seventh article of our present treaty with *Britain*.

The gentleman from *New-York* has asked, triumphantly asked, what power exists in our courts to deliver up an individual to a foreign government? Permit me, said Mr. *Marshall*, but not triumphantly, to retort the question—By what authority can any court render such a judgment? What power does a court possess to seize any individual, and determine that he shall be adjudged by a foreign tribunal? Surely our courts possess no such power, yet they must possess it, if this article of the treaty is to be executed by the courts.

Gentlemen

Gentlemen have cited and relied on that clause in the *United States* constitution, which enables congress to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; together with the act of congress declaring the punishment of those offences; as transferring the whole subject to the courts. But that clause can never be construed to make to the government a grant of power, which the people making it did not themselves possess. It has already been shewn that the people of the *United States* have no jurisdiction over offences committed on board a foreign ship against a foreign nation. Of consequence, in framing a government for themselves, they cannot have passed this jurisdiction to that government. The law, therefore, cannot act upon the case.. But this clause of the constitution cannot be considered, and need not be considered, as affecting acts which are piracy under the law of nations. As the judicial power of the *United States* extends to all cases of admiralty and maritime jurisdiction, and piracy under the law of nations is of admiralty and maritime jurisdiction, punishable by every nation, the judicial power of the *United States* of course extends to it. On this principle the courts of admiralty under the confederation took cognizance of piracy, although there was no express power in congress to define and punish the offence..

But the extension of the judicial power of the *United States* to all cases of admiralty and maritime jurisdiction must necessarily be understood with some limitation. All cases of admiralty and maritime jurisdiction which, from their nature, are triable in the *United States*, are submitted to the jurisdiction of the courts of the *United States*. There are cases of piracy by the law of nations, and cases within the legislative jurisdiction of the nation. The people of America possessed no other power over the subject, and could consequently transfer no other to their courts; and it has already been proved that a murder committed on board a foreign ship of war is not comprehended within this description.

The consular convention with *France* has also been relied on, as proving the act of delivering up an individual to a foreign power to be in its nature judicial and not executive.

The ninth article of that convention authorizes the consuls and vice consuls of either nation to cause to be arrested all deserters from their vessels, "for which purpose the said consuls and vice consuls shall address themselves to the courts, judges and officers competent."

This article of the convention does not, like the twenty-seventh article of the treaty with *Britain*, stipulate a national act, to be performed on the demand of a nation; it only authorizes a foreign minister

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Robins.* minister to cause an act to be done, and prescribes the course he is to pursue. The contract itself is, that the act shall be performed by the agency of the foreign consul, through the medium of the courts; but this affords no evidence that a contract of a very different nature is to be performed in the same manner.

It is said that the then president of the *United States* declared the incompetency of the courts, judges and officers to execute this contract without an act of the legislature. But the then president made no such declaration. He has said that some legislative provision is requisite to carry the stipulations of the convention into *full effect*. This, however, is by no means declaring the incompetency of a department to perform an act stipulated by treaty, until the legislative authority shall direct its performance.

It has been contended that the conduct of the executive on former occasions, similar to this, in principle, has been such as to evince an opinion, even in that department, that the case in question is proper for the decision of the courts.

The fact adduced to support this argument is the determination of the late president on the case of prizes made within the jurisdiction of the *United States*, or by privateers fitted out in their ports.

The nation was bound to deliver up those prizes in like manner as the nation is now bound to deliver up an individual demanded under the twenty-seventh article of the treaty with *Britain*. The duty was the same, and devolved on the same department.

In quoting the decision of the executive on that case, the gentleman from *New-York* has taken occasion to bestow high eulogium on the late president, and to consider his conduct as furnishing an example worthy the imitation of his successor.

It must be cause of much delight to the real friends of that great man; to those who supported his administration while in office from a conviction of its wisdom and its virtue, to hear the unqualified praise which is now bestowed on it by those who had been supposed to possess different opinions. If the measure now under consideration shall be found, on examination, to be the same in principle with that which has been cited, by its opponents as a fit precedent for it, then may the friends of the gentleman now in office indulge the hope, that when he, like his predecessor, shall be no more, his conduct too may be quoted as an example for the government of his successors.

The evidence relied on to prove the opinion of the then executive on the case, consists of two letters from the secretary of state, the one of the 29th of June 1793 to Mr. *Genet*, and the other of the 16th of August 1793 to Mr. *Morris*.

In the letter to Mr. Genet, the secretary says, that the claimant ^{United States} having filed his libel against the ship *William* in the court of admiralty, there was no power which could take the vessel out of court until it had decided against its own jurisdiction; that having so decided, the complaint is lodged with the executive, and he can take for evidence to enable that department to consider and decide finally on the subject.

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It will be difficult to find in this letter an executive opinion, that the case was not a case for executive decision. The contrary is clearly avowed. It is true, that when an individual claiming the property as his had asserted that claim in court, the executive acknowledges in itself a want of power to dismiss or decide upon the claim thus pending in court. But this argues no opinion of a want of power in itself to decide upon the case if, instead of being carried before a court as an individual claim, it is brought before the executive as a national demand. A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. The executive can give no direction concerning it. But a public prosecution carried on in the name of the *United States* can without impropriety be dismissed at the will of the government. The opinion, therefore, given in this letter is unquestionably correct; but it is certainly misunderstood when it is considered as being an opinion that the question was not in its nature a question for executive decision.

In the letter to Mr. Morris the secretary asserts the principle, that vessels taken within our jurisdiction ought to be restored, but says it is yet unsettled whether the act of restoration is to be performed by the executive or judicial department.

The principle then, according to this letter, is not submitted to the courts—whether a vessel captured within a given distance of the American coast was or was not captured within the jurisdiction of the *United States*, was a question not to be determined by the courts, but by the executive. The doubt expressed is, not what tribunal shall settle the principle, but what tribunal shall settle the fact. In this respect a doubt might exist in the case of prizes, which could not exist in the case of a man. Individuals on each side claimed the property, and therefore their rights could be brought into court and there contested as a case in law or equity. The demand of a man made by a nation stands on different principles.

Having noticed the particular letters cited by the gentleman from New-York, permit me now, said Mr. Marshall, to ask the attention of the house to the whole course of executive conduct on this interesting subject.

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Bobins.** It is first mentioned in a letter from the secretary of state to Mr. *Genet*, of the 25th of June 1793. In that letter, the secretary states a consultation between himself and the secretaries of the treasury and war, (the president being absent) in which (so well were they assured of the president's way of thinking in those cases) it was determined that the vessels should be detained in the custody of the consuls in the ports "until the government of the *United States* shall be able to inquire into and decide on the fact."

In his letter of the 12th of *July* 1793, the secretary writes that the president has determined to refer the questions concerning prizes "to persons learned in the laws." And he requests that certain vessels enumerated in the letter should not depart "until a his ultimate determination shall be made known."

In his letter of the 7th of *August* 1793, the secretary informs Mr. *Genet*, that the president considers the *United States* as bound "to effectuate the restoration of, or to make compensation for, prizes which shall have been made of any of the parties at war with *France*, subsequent to the 5th day of *June* last, by privateers fitted out of our ports." That it is consequently expected that Mr. *Genet* will cause restitution of such prizes to be made. And that the *United States* "will cause restitution" to be made "of all such prizes as shall be hereafter brought within their ports by any of the said privateers."

In his letter of the 10th of *November* 1793, the secretary informs Mr. *Genet*, that, for the purpose of obtaining testimony to ascertain the fact of capture within the jurisdiction of the *United States*, the governors of the several states were requested, on receiving any such claim, immediately to notify thereof the attorneys of their several districts, whose duty it would be to give notice "to the principal agent of both parties and also to the consuls of the nations interested, and to recommend to them to appoint by mutual consent arbiters to decide whether the capture was made within the jurisdiction of the *United States*, as stated in my letter of the 8th instant; according to whose award the governor may proceed to deliver the vessel to the one or the other party." "If either party refuse to name arbitrators, then the attorney is to take depositions on notice, which he is to transmit for the information and decision of the president." "This prompt procedure is the more to be insisted on, as it will enable the president, by an immediate delivery of the vessel and cargo to the party having title, to prevent the injuries consequent on long delay."

In his letter of the 22d of *November* 1793, the secretary repeats, in substance, his letter of the 12th of *July* and 7th of *August*,

August, and says that the determination to deliver up certain United States vessels involved the brig *Jane* of Dublin, the brig *Lovely Lass*,
and the brig *Prince William Henry*. He concludes with saying:
"I have it in charge to inquire of you, sir, whether these three
"brigs have been given up according to the *determination of the*
"president, and if they have not, to repeat the requisition that
"they be given up to their former owners."

Ultimately it was settled that the fact should be investigated in the courts, but the decision was regulated by the principles established by the executive department.

The decision then on the case of vessels captured within the American jurisdiction, by privateers fitted out of the American ports, which the gentleman from New-York has cited with such merited approbation; and which he has declared to stand on the same principles with those which ought to have governed in the case of *Thomas Nash*; which deserves the more respect, because the government of the *United States* was then so circumstanced as to assure us, that no opinion was lightly taken up, and no resolution formed but on mature consideration. This decision, quoted as a precedent and pronounced to be right, is found, on fair and full examination, to be precisely and unequivocally the same with that which was made in the case under consideration. It is a full authority to shew, that, in the opinion always held by the American government, a case like that of *Thomas Nash* is a case for executive and not judicial decision.

The clause in the constitution which declares that "the trial of all crimes, except in cases of impeachment, shall be by jury," has also been relied on as operating on the case, and transferring the decision on a demand for the delivery of an individual from the executive to the judicial department.

But certainly this clause in the constitution of the *United States* cannot be thought obligatory on, and for the benefit of, the whole world. It is not designed to secure the rights of the people of Europe and Asia, or to direct and control proceedings against criminals throughout the universe. It can then be designed only to guide the proceedings of our own courts, and to prescribe the mode of punishing offences committed against the government of the *United States*, and to which the jurisdiction of the nation may rightfully extend.

It has already been shewn that the courts of the *United States* were incapable of trying the crime for which *Thomas Nash* was delivered up to justice; the question to be determined was, not how his crime should be tried and punished, but whether he should be delivered up to a foreign tribunal, which was alone capable of trying and punishing him. A provision for the trial of crimes in

the

United States the courts of the United States is clearly not a provision for the performance of a national compact for the surrender to a foreign government of an offender against that government.

Nash, *alio nomine*,
Robins.

The clause of the constitution declaring that the trial of all crimes shall be by jury, has never even been construed to extend to the trial of crimes committed in the land and naval forces of the *United States*. Had such a construction prevailed, it would most probably have prostrated the constitution itself, with the liberties and the independence of the nation, before the first disciplined invader who should approach our shores. Neutrality would have impetuously demanded the review and amendment of so unwise a provision. If then this clause does not extend to offences committed in the fleets and armies of the *United States*, how can it be construed to extend to offences committed in the fleets and armies of *Britain* or of *France*, or of the Ottoman or Russian empires?

The same argument applies to the observations on the eleventh article of the amendments to the constitution. That article relates only to trials in the courts of the *United States*, and not to the performance of a contract for the delivery of a murderer not triable in those courts.

In this part of the argument, the gentleman from *New-York* has presented a dilemma of a very wonderful structure indeed. He says that the offence of *Thomas Nash* was either a crime or not a crime. If it was a crime, the constitutional mode of punishment ought to have been observed; if it was not a crime, he ought not to have been delivered up to a foreign government where his punishment was inevitable.

It had escaped the observation of that gentleman, that if the murder committed by *Thomas Nash* was a crime, yet it was not a crime provided for by the constitution, or triable in the courts of the *United States*; and that if it was not a crime, yet it is the precise case in which his surrender was stipulated by treaty. Of this extraordinary dilemma then, the gentleman from *New-York* is, himself, perfectly at liberty to retain either form.

He has chosen to consider it as a crime, and says it has been made a crime by treaty, and is punished by sending the offender out of the country.

The gentleman is incorrect in every part of his statement. Murder on board a British frigate is not a crime created by treaty. It would have been a crime of precisely the same magnitude, had the treaty never been formed. It is not punished by sending the offender out of the *United States*. The experience of this unfortunate criminal, who was hung and gibbeted, evinced

to him that the punishment of his crime was of a much more serious nature than mere banishment from the *United States*.
Nash, alias
Robins,

The gentleman from *Pennsylvania* and the gentleman from *Virginia* have both contended, that this was a case proper for the decision of the courts, because points of law occurred, and points of law must have been decided in its determination.

The points of law which must have been decided are stated by the gentleman from *Pennsylvania* to be, first, a question whether the offence was committed within the British jurisdiction; and secondly, whether the crime charged was comprehended within the treaty.

It is true, sir, these points of law must have occurred, and must have been decided; but it by no means follows that they could only have been decided in court. A variety of legal questions must present themselves in the performance of every part of executive duty, but these questions are not therefore to be decided in court. Whether a patent for land shall issue or not is always a question of law, but not a question which must necessarily be carried into court. The gentleman from *Pennsylvania* seems to have permitted himself to have been misled by the misrepresentation of the constitution made in the resolutions of the gentleman from *New-York*: and, in consequence of being so misled, his observations have the appearance of endeavouring to fit the constitution to his arguments, instead of adapting his arguments to the constitution.

When the gentleman has proved that these are questions of law, and that they must have been decided by the president, he has not advanced a single step towards proving that they were improper for executive decision. The question whether vessels captured within three miles of the American coast, or by privateers fitted out in the American ports, were legally captured or not, and whether the American government was bound to restore them, if in its power, were questions of law, but they were questions of political law, proper to be decided and they were decided by the executive and not by the courts.

The *cœsus fœderis* of the guaranty was a question of law, but no man would have hazarded the opinion that such a question must be carried into court, and can only be there decided. So the *cœsus fœderis* under the twenty-seventh article of the treaty with *Britain* is a question of law, but of political law. The question to be decided is whether the particular case proposed be one in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts.

If a murder should be committed within the *United States*, and the murderer should seek an asylum in *Britain*, the question whether

United States whether the *casus fidei* of the twenty-seventh article had occurred, so that his delivery ought to be demanded, would be a question of law, but no man would say it was a question which ought to be decided in the courts.

Nash, alias
Robins.

When therefore the gentleman from *Pennsylvania* has established, that in delivering up *Thomas Nash*, points of law were decided by the president, he has established a position which in no degree whatever aids his argument.

The case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence the demand is not a case for judicial cognizance.

The president is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence the demand of a foreign nation can only be made on him.

He possesses the whole executive power. He holds and directs the force of the nation. Of consequence any act to be performed by the force of the nation is to be performed through him.

He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he and he alone possesses the means of executing it.

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress unquestionably may prescribe the mode; and congress may devolve on others the whole execution of the contract: but till this be done, it seems the duty of the executive department to execute the contract by any means it possesses.

The gentleman from *Pennsylvania* contends that, although this should be properly an executive duty, yet it cannot be performed until congress shall direct the mode of performance. He says that although the jurisdiction of the courts is extended by the constitution to all cases of admiralty and maritime jurisdiction, yet if the courts had been created without any express assignment of jurisdiction, they could not have taken cognizance of causes expressly allotted to them by the constitution. The executive he says can, no more than courts, supply a legislative omission.

It is not admitted that in the case stated courts could not have taken jurisdiction. The contrary is believed to be the correct opinion.

opinion. And although the executive cannot supply a total legislative omission, yet it is not admitted or believed that there is such a total omission in this case.

United States
Nash, alias
Roberts.

The treaty, stipulating that a murderer shall be delivered up to justice, is as obligatory as an act of congress making the same declaration. If then there was an act of congress in the words of the treaty, declaring that a person who had committed murder within the jurisdiction of Britain, and sought an asylum within the territory of the *United States*, should be delivered up by the *United States*, on the demand of his Britannic majesty, and such evidence of his criminality, as would have justified his commitment for trial, had the offence been here committed; could the president who is bound to execute the laws have justified a refusal to deliver up the criminal, by saying that the legislature had totally omitted to provide for the case?

The executive is not only the constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided.

The department which is entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violation, seems the proper department to be entrusted with the execution of a national contract like that under consideration.

If at any time policy may temper the strict execution of the contract, where may that political discretion be placed so safely as in the department whose duty it is to understand precisely the state of the political intercourse and connexion between the *United States* and foreign nations, to understand the manner in which the particular stipulation is explained and performed by foreign nations, and to understand completely the state of the union?

This department too, independent of judicial aid which may, perhaps, in some instances be called in, is furnished with a great law officer, whose duty it is to understand and to advise when the *causae fœderis* occurs. And if the president should cause to be arrested under the treaty an individual who was so circumstanced as not to be properly the object of such an arrest, he may perhaps bring the question of the legality of his arrest before a judge by a writ of *habeas corpus*.

It is then demonstrated, that according to the practice and according to the principles of the American government, the question whether the nation has or has not bound itself to deliver up any individual charged with having committed murder or forgery

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United States lying within the jurisdiction of Britain, is a question the power to decide which rests alone with the executive department.

Neah, alias Robins. It remains to inquire, whether in exercising this power, and in performing the duty it envisions, the president has committed an unauthorized and dangerous interference with judicial decisions.

That *Thomas Nash* was committed originally at the instance of the British consul at *Charleston*, not for trial in the American courts, but for the purpose of being delivered up to justice in conformity with the treaty between the two nations, has been already so ably argued by the gentleman from *Dedham*, that nothing further can be added to that point. He would therefore, Mr. *Morrell* said, consider the case as if *Nash*, instead of having been committed for the purposes of the treaty, had been committed for trial. Admitting even this to have been the fact, the conclusions which have been drawn from it were by no means warranted.

Gentlemen had considered it as an offence against judicial authority, and a violation of judicial rights, to withdraw from their sentence a criminal against whom a prosecution had been commenced. They had treated the subject as if it was the privilege of courts to condemn to death the guilty which arraigned at their bar, and that to intercept the judgment was to violate this privilege. Nothing can be more incorrect than this view of the case. It is not the privilege, it is the sad duty of courts to administer criminal judgment. It is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense. If judgment of death is to be pronounced, it must be at the prosecution of the nation, and the nation may at will stop that prosecution. In this respect the president expresses constitutionally the will of the nation, and may rightfully, as was done in the case at *Trenton*, enter a *sicilic prosequi* or direct that the criminal be prosecuted no further. This is no interference with judicial decisions, nor any invasion of the province of a court. It is the exercise of an indubitable and a constitutional power. Had the president directed the judge at *Charleston* to decide for or against his own jurisdiction, to condemn or acquit the prisoner, this would have been a dangerous interference with judicial decisions and ought to have been resisted. But no such direction has been given, nor any such decision been required. If the president determined that *Thomas Nash* ought to have been delivered up to the British government for a murder committed on board a British frigate, provided evidence of the fact was adduced, it was a question which duly obliged him to determine, and which he determined rightly. If in consequence of this determination he arrested the proceedings of a court on a national

national prosecution, he had a right to arrest and to stop them, United States and the exercise of this right was a necessary consequence of the determination of the principal question. In conforming to this decision, the court has left open the question of its jurisdiction. Should another prosecution of the same sort be commenced, which should not be suspended but continued by the executive, the case of *Thomas Nash* would not bind as a precedent against the jurisdiction of the court. If it should even prove that in the opinion of the executive, a murder committed on board a foreign fleet was not within the jurisdiction of the court, it would prove nothing more: and though this opinion might rightfully induce the executive to exercise its power over the prosecution, yet if the prosecution was continued, it would have no influence with the court in deciding on its jurisdiction.

Taking the fact then even to be as the gentlemen in support of the resolutions would state it, the fact cannot avail them.

It is to be remembered too, that in the case stated to the president, the judge himself appears to have considered it as proper for executive decision, and to have wished that decision. The president and judge seem to have entertained on this subject, the same opinion: and in consequence of the opinion of the judge, the application was made to the president.

It has then been demonstrated:

1st. That the case of *Thomas Nash*, as stated to the president, was completely within the twenty seventh article of the treaty between the *United States of America* and *Great Britain*.

2d. That this question was proper for executive and not for judicial decision, and

3d. That in deciding it, the president is not chargeable with an interference with judicial decisions.

After trespassing so long, Mr. *Marshall* said, on the patience of the house, in arguing what had appeared to him to be the material points growing out of the resolutions, he regretted the necessity of detaining them still longer for the purpose of noticing an observation, which appeared not to be considered by the gentleman who made it as belonging to the argument.

The subject introduced by this observation, however, was so calculated to interest the public feelings, that he must be excused for stating his opinion on it.

The gentleman from *Pennsylvania* had said, that an impressed American seaman, who should commit homicide for the purpose of liberating himself from the vessel in which he was confined, ought not to be given up as a murderer. In this, Mr. *Marshall* said, he concurred entirely with that gentleman. He believed the opinion

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United States to be unquestionably correct as were the reasons that gentleman had given in support of it. He had never heard any American avow a contrary sentiment, nor did he believe a contrary sentiment could find a place in the bosom of any American. He could not pretend, and did not pretend to know the opinions of the executive on the subject, because he had never heard the opinions of that department; but he felt the most perfect conviction, founded on the general conduct of the government, that it could never surrender an impressed American to the nation, which, in making the impressment, had committed a national injury.

This belief was in no degree shaken by the conduct of the executive in this particular case.

In his own mind it was a sufficient defence of the president from an imputation of this kind, that the fact of *Thomas Nash* being an impressed American was obviously not contemplated by him in the decision he made on the principles of the case. Consequently, if a new circumstance occurred, which would essentially change the case decided by the president, the judge ought not to have acted under that decision, but the new circumstance ought to have been stated. Satisfactory as this defence might appear he should not resort to it, because to some it might seem a subterfuge. He defended the conduct of the president on other and still stronger ground.

The president had decided that a *murder* committed on board a British frigate on the high seas was within the jurisdiction of that nation, and consequently within the twenty seventh article of its treaty with the *United States*. He therefore directed *Thomas Nash* to be delivered to the British minister; if satisfactory evidence of the *murder* should be adduced. The sufficiency of the evidence was submitted entirely to the judge. If *Thomas Nash* had committed a murder, the decision was that he should be surrendered to the British minister, but if he had not committed a murder, he was not to be surrendered.

Had *Thomas Nash* been an impressed American, the homicide on board the *Hermoine* would, most certainly, not have been *murder*.

The act of impressing an American is an act of lawless violence. The confinement on board a vessel is a continuation of that violence, and an additional outrage. Death committed within the *United States*, in resisting such violence, would not have been *murder*, and the person giving the wound could not have been treated as a murderer. *Thomas Nash* was only to have been delivered up to justice on such evidence as, had the fact been committed within the *United States*, would have been sufficient to have induced his commitment and trial for *murder*. Of consequence,

quence, the decision of the president was so expressed, as to ex- United States
clude the case of an impressed American liberating himself by Nash, alias
homicide. Robina.

He concluded with observing, that he had already too long
availed himself of the indulgence of the house to venture further
on that indulgence, by recapitulating, or reinforcing the argu-
ments which had already been urged.

Moodie

1795.

April 27.

What equipments in our ports amount to a breach of neutrality. Evidence to acquit or condemn must in the first instance come from the vessel taken, the persons on board, and the examination on oath of the master and other officers.

Moodie v. The Betty Cathcart.

THE cause before the court, and in which I am now about to pronounce my decree, is a cause of considerable importance, as well with respect to the circumstances of the case, as the value of the property. It will not be necessary for me to recite at length the whole of the pleadings, and arguments that have been adduced. The facts stated in the libel, are partly admitted, and partly denied. The capture of the *Betty Cathcart*, on the high seas, out of the jurisdictional limits of the *United States*, and the property of the vessel and cargo as belonging to *British* subjects, are admitted on all hands. It is admitted also, that at the time of the arrival of the *Citizen of Marseilles*, in *Philadelphia*, she was an armed ship, and had a commission to cruise against the enemies of *France*. An exception was taken to the commission on two grounds:

1. That all the commissions issued by *Santhonax* and *Pouverel*, had been recalled.
2. That the certificate from Mr. *Petry*, the consul at *Philadelphia*, was only conditional.

The only points, then, which it is necessary for me to investigate, are:

1. Whether the force of this vessel was increased and augmented within the limits of the *United States*.
2. Whether such increase is a breach of the laws of neutrality and nations: and
3. What is required by the laws of neutrality in such cases, or whether the 17th article of the treaty is a suspension thereof as to the *United States*.

On the first part, viz. whether the force of the *Citizen of Marseilles* was increased and augmented within the *United States*. A number of witnesses have been examined,

examined, and a variety of other evidences adduced. The proofs in this cause have been very properly divided by one of the counsel, into four classes or sets. I will, therefore, consider them in that order also.

The proofs which relate to the vessel at *Cape Francois*, before she sailed for *Philadelphia*.

2. Those which relate to her whilst at *Philadelphia*.
3. Those after she left the city, and previous to her going to sea.
4. Those immediately after she got to sea.

To the first point, Mr. *Boisseau* only speaks of her as an armed vessel generally, to the month of *June* 1793, but does not specify any particulars.

W. Morris, who was on board two days, about this period, speaks of her as an armed vessel, with ten ports on each side, and guns in them, and also as having guns in her hold—but no particular number. These are the only witnesses to this point.

If we proceed now to her appearance at *Philadelphia*, we find a contrariety of evidence.

General *Stewart*, in his letter to the collector, 3d of *September* 1794, mentions her as having at her arrival sixteen nine, and ten six pounders; but he does not say, whether they were mounted or not. He says she will only mount twelve guns at going out, and carry the others in her hold. In his letter to the secretary at war, dated the 14th *October* 1794, he refers to the above, and also states the different reports of Mr. *Milner*, one of the deputy inspectors of the port, to him. The first, on the 30th of *September* 1793. He adds, that the ship arrived last autumn, with sixteen nine, and ten six pounders, but will only mount twelve guns, which she brought in that situation—the others she is to carry in her hold. On the 14th of *October*, general *Stewart* visited her again, and says he finds no addition to the armament, she was reported, and had, on her arrival, viz. ten six pounders on her main deck,

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and two on her quarter deck, and the rest of the guns in the hold. No new ports had been opened since her arrival. General *Stewart* does not say who reported her thus on her arrival. It could not be Mr. *Milnor*, for he, on the 14th of *October*, in his reports, says, "Having examined the ship called the *Citizen of Marseilles*, on her arrival in port, I again examined her this day, and find no addition to her armament, &c." The same number of guns are mentioned, that she had on her arrival. His other certificate which appears from general *Stewart's* letter to be dated on the 30th of *September* 1793, and made to him, of the then actual armament of the ship that day, the day of her arrival—says—"boarded the privateer ship the *Citizen of Marseilles*, commanded by *Planche*, twelve six pounders mounted and three not mounted, with other warlike apparatus—forty-six men." By comparing the dates and extracts in this exhibit, it plainly appears there is some mistake amongst the officers at that port. Mr. *Milnor*, on the 30th of *September* 1793, the day she arrived, boarded her, and says she had twelve six pounders mounted, and three not mounted: he also visited her on the 14th of *October* 1794, and found no addition to her armament, the same number of guns being mounted.

This evidence from the report of the officers of the port, clearly proves, that the ship, on her arrival, had *only* twelve guns mounted—how many others there were on board *not* mounted, must be left to the officers to settle, as I cannot do it from the evidence adduced. Mr. *Harrison* also fixed to ten on her main deck, and two or four on her quarter deck. *Michael Williams* says, she had but five of a side on her main deck, and two on her quarter deck. *John Grenion*, who sailed in the vessel from the *Cape* to *Philadelphia*, says she had only five of a side on the main deck, and

one

one on each side on the quarter deck, and that there were no more port holes open than guns.

Captain *Montgomery*, of the revenue cutter, who saw her at a distance at her first arrival, supposed her to have ten ports of a side, but whether all real, or some painted, he could not say.

From the whole of this evidence, then, it clearly appears to me, that the ship, at her arrival, had only twelve guns mounted, and *none* in her hold. If we now advert to the number of ports which were open either at her arrival, or at her leaving the *port of Philadelphia*; we find she had the same number as of guns *mounted*. All the evidences who were near her, swear positively, that there were *none* abaft the *main chains*—though several say the ports were framed within, but planked over on the outside. *Harrison's* evidence is conclusive—because *he* mentions his application to the governor for permission to *open more ports*, which was *refused*; and captain *Chabert's* reply that he did not wish to go contrary to the laws of the country, and that as he had carpenters of his own, he could open them elsewhere, and at another place, is fully sufficient to fix this point.

The third class of evidence, is such as relates to the vessel after her leaving the city, and previous to her proceeding to sea.

And from a careful revision of this it does appear, that a number of ports were opened, and guns mounted in the *river Delaware*. *Quin* swears positively to fourteen. *Powel* says there were three carpenters at work to cut the ports through, and fit them—himself, *Stevenson* and another; and that *each* took *one* for a day's work. It could not therefore take more than five days to effect this, and from the latter end of *October* to the 4th of *November*, there was sufficient time to complete it.

The evidence of these two witnesses has been impeached

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1795. peached in several particulars, but it really appears to me, that there are so many proofs and circumstances stated, that corroborate their testimony to most of the points they speak of, that there is not sufficient ground for me to repel the evidence they have given *in toto*.

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The witnesses who prove the increase of force in the river, are *Quinn*, who says she mounted twenty-eight guns—captain *Montgomery* says twenty-six or twenty-eight. Mr. *Kevan* says, a whole tier fore and aft. All then speak of the vessel down the river, and before she went to sea.

The fourth and *last* class, is that relative to her, immediately after her going to sea.

One of the counsel for the claimant objected to the testimony of all the witnesses on board the prize, as being *interested*, and of course incompetent, but he could not be serious in this, because the constant uniform practice of the civil law courts has been to admit such evidence to certain points. In *Collectanea Juridica*, page 135, is the famous case so often resorted to as fixing the law. In this case, it is expressly laid down, that the evidence to *acquit* or *condemn*, must, in the first instance, come from the *vessel taken*, the persons on board, and the *examination on oath* of the *master* and other *officers*.

The evidence they all give is reducible to two points.

1st. The appearance and force of the ship both as to guns and men.

2d. The *intelligence* obtained from the crew. As to the last, I think little attention should be paid to the chit chat on board one of these privateers; and very frequently the witnesses do not understand the language they hear spoken, and report from second hand: but they certainly are competent witnesses as to the number of guns and crew that were on board at the time of the capture; and in this they all agree, that she mounted

mounted twenty-eight guns, when she took the *Den Onzekeran*, out of which she took two guns to make thirty, and several of them say, she could mount thirty-four guns, having ports cut for that number.

Captain *Raymon Sanchez*, captain of the brig *Di-choso*, taken on the 6th of November, two days after the vessel left the *Delaware*, says she mounted twenty-eight.

Lemuel Janson, of the *Den Onzekeran*, says she mounted twenty-eight guns. *Jacob Vix*, a sailor on board the Dutch ship, says the same. *John Hallrick*, seaman on board the *Betty Cathcart*, says the same. *Charles McDonald*, mate of this ship, says she had twenty-eight guns on the 11th of November, when they took him.

Hans Evertson, mate of the *Den Onzekeran*, taken the 16th of November, says she had then twenty-eight guns mounted.

Adrianus Pappagaay, the doctor of the Dutch ship, says she had twenty-eight guns. Here then is such concurrent testimony of the increased force of this vessel, that it is impossible not to admit it; and if admitted, it carries with it the most unequivocal proof that the ship the *Citizen of Marseilles*, did increase her force of guns mounted, and prepared for use within the territory of the *United States*:—There was no positive proof as to the new gun carriages being actually carried on board; neither was there any of their being on board when she first arrived. Mr. *Harrison* mentions the repairing of some, and where old ones were rotten, the replacing them. If this was solely for those guns that were actually mounted at her arrival, I see nothing against it. It could not be called an augmentation of her force—neither is there any evidence sufficient to convince my mind that the crew of the *Citizen of Marseilles*, at her going out was increased, or if increased, in any way that could be said to infringe

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our neutrality. Though some of the evidences say they were not all native Frenchmen from their language, yet they all agree that the strength of the crew were so, the others were a mixture, there is no proof of any one American citizen being on board, unless *Quin* was; as to other nations, I know of no right we have to control their seamen. The 27th article of our treaty with *Holland*, which, by the 3d article of the treaty with *France*, in my opinion is confirmed to *them* also, admits the carrying away seamen or other natives or inhabitants of the respective nations on board of any of their vessels, whether of merchandize or war.

From a *careful review* of the evidence produced in this cause, it appears clearly to me that the ship *Citizen of Marseilles*, at her arrival in *Philadelphia*, mounted only twelve guns, and had others, but the precise number is not *ascertained*, in her *hold*: that at the time of her leaving the river, she had twenty-six or twenty-eight mounted: That captain *Chabert* having been refused permission to open new ports in *Philadelphia*, and declaring he did not wish to infringe the laws, and having afterwards done so within the territories of the *United States*, could not and does not plead ignorance as an excuse. Whatever he did was with his eyes open, and being forewarned, he must abide the consequences.

It remains now for me to inquire into the law arising from the foregoing facts, and the power and duty of this court thereupon.

There cannot be a doubt that if a prosecution was instituted against captain *Chabert*, or any of the persons concerned in increasing, augmenting, or *procuring* to be increased or augmented, the force of the vessel, under the act of *June* last, but that a conviction must follow. There a penalty of fine and imprisonment is declared, as a punishment for a breach of the sovereignty

sovereignty and neutrality of the *United States*, and this by a *municipal* law of our own: but what does the *law of nations* require further? I have in the course of the last summer, delivered my opinion on this question so fully in this court, that I need only now repeat some part of the law then laid down. In the case of *Janson v. Talbot*, I stated that this court, by the law of nations, has jurisdiction over captures made by foreign vessels of war, of the vessels of any other nation, with whom they are at war, *provided* such vessels were *equipped* here, in breach of our sovereignty and neutrality, and the prizes are brought *infra præsidia* of this country. By the law of nations, no foreign power, its subjects or citizens, has any right to erect castles, enlist troops, or equip vessels of war in the territory or ports of another. Such acts are breaches of neutrality, and may be punished by seizing the persons and property of the offenders. Vessels of war so equipped, are *illegal ab origine*, and no prizes they make will be legal as to the *offended power*, if brought *infra præsidia*. The seizure and restoration of such prizes are what the laws of neutrality justly claim. You must either permit both parties to equip in your ports, or neither. Should either equip without *your* consent, the *least* you can do, is to divest them of the prizes they may have thus *illegally* taken, and restore them to the other party, or else permit them to equip also. This cause and this decree were submitted to the circuit court in *October* last, and there affirmed. An appeal to the supreme court is still undetermined, but until this opinion is overruled by *that* tribunal, I hold myself bound to consider it as a law.

I gave a like decision lately, in the case of the schooner *Nancy*, from a full conviction that the principles I laid down formerly, were founded on the rules of *propriety* and the law of nations.

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1804.
Sept. 6.

Property captured by a French privateer, sold in a Spanish port before condemnation, and brought by the purchasers to this place, will be restored by this court, upon suit brought by an agent of the first owners; the property being sufficiently identified, and the original owners being citizens of the U. States.

Henry Rose v. Himili, Gronings, and a quantity of Coffee.

ALTHOUGH two separate libels have been filed in this cause, yet it has been considered all along as forming but one suit. There have been, also, separate claims interposed, and the pleadings are made up in both cases separate; but all the evidence adduced, and the arguments of counsel, have, in a great measure, considered this cause in one view *only*, with the exception of its being contended that the claimants, *Gronings*, stand in a different situation, as being purchasers (without notice, and at second hand) of a part only of the coffee in dispute. The libels, which are transcripts of each other, state, that the schooner *Sarah*, commanded by *Joshua Hubert*, with *Henry Rose* on board as supercargo for the owners, American citizens, residing at *Norfolk* in *Virginia*, being on a voyage from *Port-au-Prince*, where she had taken a cargo entirely belonging to citizens of the *United States*, and bound to *Virginia*, was, on the 24th *February* last, on the high seas, a few leagues from the island of *Cuba*, forcibly taken possession of by a French privateer called *La François*, commanded by one *Domnaque*, and carried into *Barracoa* under Danish colours; where, without any investigation or condemnation, according to the established laws of nations, the cargo was sold and disposed of to a certain *Raymond Cott*, either on his own account or as agent for others, and the greater part thereof clandestinely removed in the night from the said schooner *Sarah* on board the schooner *Example*, commanded by the said *Cott*, and brought into this port by him in the month of *March* last, when it was attached by process from

from this court, on account of the former owners. To 1804.
this libel two several claims and answers have been filed: one by *I. I. Himili*, as consignee and agent for *Nathaniel Bingley*, a citizen of *Virginia*, and owner of twenty-eight hogsheads, two tierces, and six sacks of coffee, imported in the schooner *Sarah* and arrested as stated in the libel; the other by *Lewis* and *R. Groning* as owners of forty hogsheads of coffee imported in the schooner *Example*, and arrested as also stated in the libel. The claimants neither admit nor deny the allegations in the libels, having, as they allege, no knowledge thereof; but say, that they had heard and believe that the schooner *Sarah* and cargo were captured as there stated, and were forfeited by the laws of *France* for trading with the brigands of *Hispaniola*. The claims and answers further state, that the said *Henry Rose*, fully sensible of the forfeiture incurred, and to prevent the delay incidental to condemnation, which only could be effected by sending to the tribunal of *St. Domingo*, agreed to purchase the vessel and a part of the cargo from the commander of the privateer, on terms settled between them, without waiting for a formal condemnation. The claimants further state that they have heard and believe, that a regular condemnation had been made of vessel and cargo at one of the ports of *St. Domingo*; that the sentence was detained for forty days by some accidental causes, but afterwards forwarded to the captain of the privateer. The claimants further state that a special agent had been sent to procure a copy of the condemnation, and they contend that, admitting the capture as stated in the libel, yet as the sale was with the assent of the actor in the first instance, and since sanctioned by the decree of condemnation, (as they have heard and believe) therefore their right and title is good in law, and the libel ought to be dismissed. Replications have been filed to these claims and answers, which admit the

1804. the purchase of the schooner *Sarah* by the said *Henry Rose*, and the claims and answers in relation thereto,
Henry Rose et al. but protest against every other part of the same.

From this view and statement of the pleadings, several questions have been made and agreed upon by the different counsel.

1. As to the identity of the articles.
2. As to the legality of the capture.
3. As to any change of property by the capture.
4. Whether the libellant's title to the property is such as will entitle him to maintain suit for the same.

In considering these questions I will begin with the last, viz. Whether under existing circumstances of the trade to *Port-au-Prince*, the actors could acquire property in any article purchased there.

The counsel for the claimants have, with great ingenuity, contended this point, and adduced a variety of reasoning to prove that the cargo of the brig *Sarah* having been purchased in a brigand port, the title is bad in the first instance. Admitting the force of this argument, as far as it may apply in a court of the nation claiming the jurisdiction and where this is stated to be an offence, the question occurs—Is this court competent to decide? The proclamation said to have been issued, forbidding such trade, is not produced. Hearsay evidence of its being issued is brought forward, but in such a loose and vague way as to afford no precise knowledge of its tenor; and even if it did exist, it being only a municipal law of that country, this court can have no cognizance of a breach of it. The case of the *Walsingham* packet, quoted from 2 *Robertson* 77, does not apply. The question there was, whether a British court of admiralty was not bound to take notice of a flagrant breach of the municipal laws of that country, as respected the transactions of their own subjects, coming immediately before them: even there the principle was not recognized in the

the court below, but on appeal to the superior court 1804.
it was established and affirmed, that a British claim- ^{Henry Rose}
ant could not entitle himself in that court to a restitu- ^{V.}
tion of property, which, by his own shewing, had been ^{Himself et al.}
employed in an illicit trade. Is there any similarity
between that and the present case?

By the ninth section of the judiciary act, this court has jurisdiction of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade, where the seizures are made within their respective districts, either on land or water, as well as upon the high seas; and also of all suits for penalties or forfeiture incurred under the laws of the *United States*; but will this give jurisdiction as to any offences against the municipal laws of other countries? Surely not.

This case was assimilated to that of blockade. One is recognized by the law of nations, or treaty, which is tantamount between the parties to the treaty. The other is merely municipal; but I will suppose that a neutral vessel had escaped from a blockaded port and was captured for having entered it contrary to the law of nations; and that this vessel is afterwards recaptured. Will it be contended that the original owner, in a court of his own nation, cannot claim his property on payment of salvage, because he had committed a breach of the law of nations? The entering the blockaded port was only illegal as to the nation at war: the party does it at his peril; he runs the risque and is amenable to the offended nation if caught. Do policies of insurance become void, because of this illegality in the trade? The premium of insurance rises according to the risques, but the contract is not vitiated by a breach of the municipal laws of other states. On this point therefore, I am decidedly of opinion that this court has no jurisdiction.

I will now consider whether any change of property has

1804. has taken place; and here it might be sufficient to say, <sup>Henry Rose
Himili et al.</sup> that no evidence on that point has been produced, except the seizure and carrying the *Sarah* into *Barracoa*; and the consequent possession for twenty-four hours and upwards, which was contended on the authority of *Vattel* to be sufficient. To this I answer, that it seems to be the settled law of nations at this day, that before ship or goods can be disposed of by the captor there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation there-upon, as prize in a court of admiralty, judging by the law of nations and treaties. This is laid down in the famous answer to the Russian memorial, reported in *Collet. Juridica*, p. 135; and the law there stated has never been controverted since. In *Douglas* 591. *Leuds v. Rodney*, Lord Mansfield declared the unanimous opinion of the court. That no property vests in any goods taken at sea or land till a sanction of condemnation. This was recognized and established in this state in the case quoted from *Bay's Reports* 471. There the court declared, they could by no means assent to the doctrine from *Vattel*, (which was relied on with such apparent earnestness in this cause also) and after referring to numerous authorities the judges declare, that after all those authorities, and the reason of the thing itself, which appears to be a part of the acknowledged law of nations, a bare dictum of *Vattel's*, however respectable his authority may be in other respects, is not of sufficient weight to justify the position contended for. It is stated in the pleadings that the party consented to the sale and transfer. No proof however is produced on that point. I shall therefore pass it over, as well as the next, relative to the legality of the capture, that being already considered fully in the first part of this decree.

The last and only remaining question to be considered is respecting the identity of the articles libelled against.

against. It appears from the return of the marshal on 1804. the first warrant, that he arrested twenty-eight hogsheads, two tierces, and six sacks of coffee, which, by the claim and answer of Mr. *Himili*, he acknowledges to have been imported in the schooner *Sarah*, and consigned to him by *Nathaniel Bingley*. This part of the *Sarah's* cargo had never been removed from the time it was shipped at *Port-au-Prince*, until the *Sarah* arrived in this port; and the counsel for the claimants acknowledge the evidence respecting these articles, to be strong, though not conclusive. I have no doubt on the matter, and therefore decree restitution thereof with costs. The marshal returns on the second warrant, that he arrested forty hogsheads of coffee, as mentioned therein, part marked WP, and part HR. These marks agree with the original invoice at *Port-au-Prince*; they were imported here and landed from the schooner *Example*, Captain *Cott*, as appears by his manifest, delivered to Mr. *Thompson*, the boarding officer. It appears that he purchased part of the *Sarah's* cargo at *Barracoa*, that the schooner *Example*, which he commanded there, was carried alongside the *Sarah*, and took out great part of her cargo in the night, and brought it to this port.

Richard Smallwood, a customhouse officer, weighed the cargo of the schooner *Example*; it consisted of hogsheads and bags of coffee, and of coffee in bulk. Some of the hogsheads were marked HR, but the R was scratched over by the mate to make it agree with the permit.

Park Avery says, Mr. *Groning* purchased eighty-one hogsheads and other parcels of coffee from Mr. *Himili* in *May* last, imported in the schooner *Example*, and marked H. Some were marked WP and HR, others had their marks rubbed out; and in some of those marked HR, that mark was erased; but this had

1804. been done prior to Mr. Groning's purchase, who was
 Henry Rose ignorant of any claim to them.

Himili et al. Captain Muiz proved the removal of part of the cargo from the *Sarah* to the *Example*, at Barracoa, at night.

James Gabeau proved the landing of about eighty hogsheads of coffee from the schooner *Example*, marked WP, which mark he erased. Captain Dickenson saw forty hogsheads of coffee turned out of Mr. Groning's store; he could trace out the old marks of WP and HR, one of which had a paint brush run across it.

Mr. Martel was present when the marshal seized forty hogsheads coffee from Mr. Groning. The marks were scratched out, some with a painter's brush, others with a cooper's ax. The original marks, however, WP and HR were still discernable, and the whole were new marked H; many of those marked WP were done by himself at Port-au-Prince. Mr. Luckman, the deputy marshal, says, he seized forty hogsheads of coffee in Mr. Groning's possession, who said he had purchased them from Mr. Himili; they had been originally marked in the centre of the head, WP and HR; some were dubbed off, and others blacked over; and they were all new marked with the letter H.

Here then is evidence of eighty-two hogsheads with these marks, having been landed from the *Example*, evidence of part of the cargo of the *Sarah* being put on board the *Example* in the night, further evidence of the cargo of the *Sarah* having been purchased by captain Cott for Mr. Bingley, of his consigning it to Mr. Himili, and Mr. Himili selling it to Mr. Groning, of all the marks being altered, after her arrival here, but they were still so visible as to be plainly distinguished, and all this from the evidence of seven different witnesses. Compare this with the case quoted from Robertson's Reports 328.; there the court said it did not absolutely

absolutely appear, that the ship was the same, and the property may have undergone a conversion by fair sale; here there can be no doubt either as to vessel or goods; it is scarcely possible ever to obtain clearer evidence than that before the court. The articles are the same, and no evidence is produced, to shew that the original owners have ever been legally divested of them. I am therefore decidedly of opinion, that restitution of the forty hogsheads be also made, and decree accordingly, but without costs as to Messrs. *Gro-nings*; they were innocent purchasers, and although they may have their remedy over, yet they ought not to be saddled with the costs of this libel. Theirs is different from *Bingley's* purchase, who knew the situation of vessel and cargo, as captain *Maz* says he heard him declare that the captain of the privateer was wrong to give up the vessel's papers, as there would be some difficulty in condemning her. Let these parties therefore each pay their own costs.

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Henry Rose

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As notice of an appeal has been publicly given, I have entered more fully into the reasons of my decree than usual. I have maturely weighed the arguments of the counsel, and considered the circumstances of this case, and having determined to the best of my judgment, I shall rest perfectly satisfied with the decision of the superior tribunals.

1805.
April.

Henry Rose v. I. I. Himili and a quantity of Coffee.

A sentence of condemnation, founded upon a municipal regulation, which was not made till after the capture of the property on the high seas, shall not avail to prevent restitution of such property to the original owners, if it be brought within the jurisdiction of the courts of this country, of which those owners are citizens.

THE proceedings in this case are similar to those in the cause between the said parties, which was determined before me on the 6th of September last. In the decree then delivered I stated that, although two separate libels had been filed, yet they had been considered as forming but one suit; and the parties agreed that all the evidence then produced, should be applied to both cases. But as new evidence has since been adduced, and which is contended on the part of the claimant to be final and conclusive, it has become necessary to reconsider the testimony as far as relates to the case now before the court.

It is contended by the advocates for the actors that two points only are necessary to be considered.

1st. Whether the property libelled against is established by sufficient proof, to be the same that was seized on the high seas, and carried into *Barracoa* and there sold?

2d. Whether the right of the original owner has undergone any change?

In support of these points, the whole evidence as to the identity of the articles, has been recapitulated; and the new evidence of Mr. *Bingley*, (who was mate of the *Sarah* when captured, and who purchased and shipped, by his own shewing, all the remainder of the *Sarah's* cargo, that could not be stowed in the *Example*, and consigned it to the claimant by the *Sarah*) in addition to the former evidence, is contended to be fully sufficient as to the first point.

As to the second, (whether the right of the original owner has undergone any change) a variety of arguments

ments has been used, and a number of cases produced to shew that no change of property has taken place, particularly that the decree of condemnation, which could not be procured on the former trial, but is now produced and filed, can have no operation on the present question, because that decree is dated the 13th of *July 1804*, and is grounded on an ordonnance of the governor general of *St. Domingo*, dated the 10th of *March* preceding; whereas it appears from evidence before the court, that the capture was made on the 23d *February 1804*, fifteen days prior to the ordonnance, for a breach of which she is condemned; and that the process of this court, under which this suit was commenced, issued in *April*, three months before the date of the decree of condemnation. A number of cases were produced to shew that property taken on the high seas cannot be changed but by condemnation, and that this must be done by courts of competent jurisdiction, and also that it must appear that the property was condemned either as contraband or belonging to an enemy.

That in the present case the offence stated in the decree of condemnation, being for a breach of municipal law, the court could have no jurisdiction, unless seizure was made within its jurisdictional limits, and not on the high seas. For the claimant it was contended,

1st. That it was incumbent on the actor to shew a good title to the articles in the first instance.

2d. That he has been divested of it improperly, by this suit. It was contended with great earnestness that *Port-au-Prince*, at the time of the purchase, being possessed by the brigands, no sale by them could be legal, and, therefore, the actors having no good title in the first instance, cannot claim the justice of this court.

3d. That the capture was made in such a way as to enable

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1805. enable the purchasers under it to hold against all persons whatsoever. It was also contended, that although Henry Rose Hinlli et al. the decree of condemnation recites the ordinance of the governor general of the 10th *March* only, yet there were previous ordinances of a similar nature against trade with the brigands, and that the decretal part being the substance of the decree, and that part declaring the property to be condemned, is fully sufficient; and that the reasoning on which it is founded, cannot affect the decree itself. That, let the grounds of condemnation, in a court of competent jurisdiction, be what they may, the sale is conclusive as to purchasers, even if made before condemnation. Much time was consumed in the discussion of cases relative to insurance, which differ extremely from the present; as also respecting condemnations, where the vessel was not immediately within the jurisdiction of the court, but in another country.

I do not think it necessary at present to go over all these arguments and cases again. I have formerly decided on this point, and find the case from 4 *Robinson* supports that decision. In my former decree, I examined minutely all the evidence as to the identity of the property, and if any further proof was wanting, that is fully supplied by the new witness, Mr. *Bingley*.

The only question, therefore, now necessary for me to investigate is, whether the decree of condemnation filed in this cause, is final and conclusive, or whether this court, under the peculiar circumstances of this case, may not, if it shall be found irrelevant, say so.

In a former decree already mentioned, I also delivered my opinion that no transfer of property could legally take place so as to divest the former owner, without a regular previous condemnation by a court having competent jurisdiction. How will this apply to the case now before me?

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The property libelled is forcibly taken possession of 1805.
on the high seas 25th *February* 1804, the sale is made Henry Rose
soon after, and the property brought to *Charleston* the Himili et al.
22d April following, where it was attached by process
of this court. No condemnation of this property took
place until the 13th *July* following, and the only
ground stated for such condemnation is an ordonnance
of the governor general of *St. Domingo*, dated the
10th *March* preceding, and subsequent to the capture;
but it is alleged that there was proof of another ordon-
nance forbidding the trade, in a former cause; if so,
it should have been produced again and made an ex-
hibit, if reliance on it was contemplated. I hold my-
self bound to determine according to law, and the evi-
dence produced or admitted in each case. It might be
sufficient for me on this occasion, barely to refer to
former decisions, where I have thought it necessary
that a regular condemnation should precede a sale,
unless by order of court, with consent of parties, or in
case of perishable articles; but where a decree of con-
demnation is brought forward and relied on, and it
appears on the face of it, that it is grounded on an or-
donnance, (and that a municipal one) passed subse-
quently to the capture, ought not the decree to be
opened and examined, and can this in any manner
shake the established doctrine that decrees of foreign
tribunals ought to be respected? I think not. Had the
property been condemned as belonging to an enemy
or as contraband of war, I should have thought myself
bound not to interfere, and the only remedy left to
the owners would have been that pointed out by the
counsel for the claimant, to apply to the court of ap-
peal of the party, where the condemnation was made,
or to the executive of the party insured. But in the
present case, as the property of the actors was actually
brought within their own jurisdiction long before any
judicial

1805. judicial decision had taken place elsewhere, and as the Henry Rose marshal of this court had the custody of it, at least ^{v.} Himili et al. three months prior to any such decision, that alone might have been good cause for ordering restitution; but when in addition to this it appears that the decree declaring this legal prize, is stated to be in pursuance of a local ordonnance, and that made subsequent to the seizure, I hold myself bound under the circumstances of this case to support the libel filed in this cause, and do order, adjudge and decree that the prayer thereof which claims restitution, be granted. As it does not appear that the claimants was any way concerned in the capture, or that there was any collusion between her and the captors. I therefore order that each party pay his own costs.

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The two preceding cases of *Rose v. Hinely* were decided by judge *Bee*, and as they were carried by appeal into the higher courts, we subjoin, for the information of the reader, the following decisions by judge *Johnson* in the circuit court of *South Carolina*, and also the opinions of judge *Johnson* and chief justice *Marshall* in the supreme court of the *United States*, on the several appeals.

CIRCUIT COURT OF SOUTH CAROLINA.

Rose v. Hinely et al. on Appeal from the Admiralty.

JOHNSON, Circuit Judge.

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January 11.

CERTAIN parcels of coffee were libelled against as having been illegally captured on the high seas, and sold without any condemnation. They were claimed by *Hinely* and others, who stated that the *Sarah* had been engaged in an illicit trade with the brigands; that, on her return, she was captured by a French privateer, and carried into *Barracoa*, where she was duly libelled and condemned: and, though she had not been duly condemned, yet that the cargo could not be reclaimed, as it was sold by consent of the supercargo of the libellants.

On the sixth day of September last this cause came on to be heard before the district court, and the articles libelled were condemned for want of evidence to support the allegations of the claimant. From this decision an appeal is made to the circuit court, and two questions have been argued, upon which I am now to decide.

1st. Whether the party appellant is entitled to adduce new evidence.

2d. Whether, upon cause shewn, the court would assign him a term probatory, for that purpose.

Upon the first question, the argument of counsel turned chiefly upon the construction of the act of congress of March 3d 1803, which gives the right of appeal from the district to the circuit court, and from the latter to the supreme court of the *United States*. It was admitted that the clause respecting the adduction of new evidence relates solely to the supreme court; but, if the supreme

court

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Himely et al.* court was bound to receive new evidence in such cases, it was contended that there would be an absurdity in denying the right to do so to the circuit court, to which an appeal lies in the first instance.

It does not appear to me that the question in this case depends at all upon the construction of this act. The clause which relates to the adduction of new evidence in the supreme court, was intended only to restrict that court from receiving new evidence in any other causes than those of admiralty or maritime jurisdiction; with regard to which that court is left at liberty to regulate its proceedings by the principles of the civil law, by which they are governed in such cases. Whether, therefore, the appellant in an admiralty cause is entitled to produce new evidence, is a general question; and, however inconsistent it may appear to those who consider the subject according to the principles of common law, it is certainly laid down in writers upon the civil law (*Clarke's Praxis, Conect on Courts, Brown on Civ. and Adm. law*) that the appellant has the privilege "*non allegata allegore, et non probata probare;*" or, in other words, to go into a plenary investigation of his case under a very few restrictions, introduced only for the purpose of protecting the appellee, as it should seem, from the danger of perjury or surprise. An appeal, therefore, in the admiralty is rather in nature of a new trial, in which the court does not enter into the mere consideration of the propriety of the decision of the judge below, upon the evidence before him, but affords an opportunity to the appellant to present his case with the best possible aspect that new allegations, or new evidence can afford it.

My decision on the second point must depend upon the nature of the evidence proposed to be adduced, and the sufficiency of the grounds set forth in the affidavit to shew that the inability of the claimant to produce such evidence at the time was not attributable to his own laches.

The evidence proposed to be adduced was a duly certified copy of the condemnation, and the examination of witnesses to prove that the defendant had consented to the sale at which the claimant purchased: and the cause shewn on affidavit why he is not chargeable with laches is the embarrassed state of French affairs in the island of St. Domingo, and the loss of a vessel by which he had ordered the sentence of condemnation to be forwarded, and the captain of which was a witness to prove the assent of the defendant to the sale.

With regard to the materiality of the evidence, there can be no doubt: a condemnation sanctioned by the law of nations would have

have set every question to rest; and the assent of the supercargo to the sale at which the claimant purchased would certainly have changed the property of the articles sold, so that the libel could not have been sustained, however the libellant might have retained a claim against the captors for the proceeds of such sale.

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The causes set forth by the claimant to exempt himself from the imputation of neglect are also, in their nature, free from all suspicion. They cannot be mere fabrications; they are facts of general notoriety, and such as may well have produced the disappointment attributed to them.

I therefore order that the appellant have time assigned him until the sitting of this court in *May* next to adduce evidence to prove the assent of the libellants to the sale of the articles libeled, or the legal condemnation thereof, according to his prayer.

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Rose v. Himely et al. on appeal from the District Court.

JOHNSON, justice. Although there are three distinct libels filed in these cases, yet, in the course of investigation, they are all brought to depend upon the same circumstances, and were argued before me as one cause. The two first were decided in September last, when the copy of the condemnation had not been received, and the decision of the district court rested upon the ground of a defect of condemnation. But, upon a motion before this court for leave to adduce new evidence upon the appeal, I decided in favour of its admissibility, and the sentence of condemnation having been received before the expiration of the term probatory assigned to the appellants, I am now, consistently with my decision, to consider the condemnation as equally affecting the rights of the parties in all the three cases.

At the hearing upon the appeal there was also a witness in behalf of the appellants who testified that he was one of the officers of the capturing vessel, and that he saw in the possession of his captain a permit from the agent of the French government resident at *St. Jago*, to sell the *Sarah* and her cargo, and that she was sold by virtue of that permit. But I shall not notice this evidence in framing my opinion, because it appears to me subject to this objection, that a certificate of the granting of such a permit might have been obtained from the chancery of the agent himself, if such an officer existed, and did that act in an official capacity.

Upon the hearing of the two first causes in the district court the identity of the goods was also a point; and a defect of evidence to prove that identity was strongly insisted upon in the argument; but this ground was relinquished upon the appeal, and the only point contested was the right of property.

The following are the circumstances on which the court proceeds to form its decision, as they are collected from the libels, answers, depositions, and writings in evidence.

The schooner *Sarah*, an American bottom, owned by citizens of the *United States*, sailed from *Norfolk* with a cargo consisting entirely of provisions, owned also by citizens of the *United States*. For whatever port she cleared, her real destination was to the brigand ports of *St. Domingo*, several of which she entered; and, having disposed of her cargo, took in the sugar and coffee which

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are the subject of this suit. On her voyage from *Port de Paix*, one of these brigand ports, she was captured by a French privateer and carried into *Barracoa*, where *Rose*, the supercargo, and libellant in these cases, purchased her from the captors. The principal part of the cargo was purchased by captain *Cott*, of the *Example*, then lying at *Barracoa*, in behalf of the respondent *Himely*, and transferred during the night from the *Sarah* to the *Example*.

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The *Example*, having sailed for this port, was followed by *Rose*; and the sugar and coffee, shipped on board of her from the *Sarah*, have been libelled on behalf of the original owners. Prior to the suing out of the libel, part of the coffee had been sold to Messrs. *Gronings* of this place, who are acknowledged to be innocent purchasers without notice; but, as the English doctrine relative to sales in market overt is unknown to the laws of this state, it is not contended that their claim rests on any better ground than that of *Himely*, or *Cott*, who purchased immediately from the captors.

It appears, that when the cargo of the *Sarah* was sold, no condemnation had taken place; that she was afterwards libelled and condemned at *St. Domingo*, on the 13th *July* 1804. The *Sarah* had been captured on the 23d *February* 1804; the sale of the cargo took place on the 18th *March*, and had arrived in this port and been proceeded against by warrants out of the district court, served on the 4th *May* 1804, more than two months previous to the date of the sentence of condemnation.

Upon examining that sentence, it appears to be professedly founded upon an arrêt of the captain general *Ferrand*, dated *March* 1st, 1804, declaring the port of *Santo Domingo* to be the only free port in that island, and directing that neutral vessels trading to any other port should be brought to adjudication.

It was asserted in argument, and was, I believe, the fact, that general *Le Clerc* had formerly issued a similar arrêt; but this has not been proved to the satisfaction of the court, nor does it appear to be one of those facts, the notoriety of which will justify this court in noticing it.

On behalf of the claimants, it is contended, that there is an original defect in the title of the libellants, as the property appears to have been purchased from revolted slaves, a description of people who could not possess, and, of course, could not convey a right of property to others. That there is a turpitude in the trade, which ought to predispose this court to discountenance the pretensions of the libellants. That if the libellants ever possessed a right, it was defeated by the capture which, alone, gave

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1805. a possession, not to be violated by us; if not by the capture, by
Rose the carrying *infra presidia*; if not by carrying *infra presidia*, by
v. the effect of the condemnation.

Hixley et al. For the libellant it was argued that there could be no original defect in the title acquired from the brigands, because a power existing *de facto*, is, to neutrals, a power *de jure*. That the subjects of the existing government of *Hayti* were a mixed multitude of slaves and coloured freemen, the latter of whom, before the revolution, possessed extensive estates, and who, for aught we know, may have been the vendors of these articles. That the law of nations knows no such description of persons as slaves; nor is every description of slaves, even within the *United States*, destitute of right of property. That opinions on this subject are widely different, and that decisions of courts would fluctuate according to the state in which they were pronounced, and the judge who presided. That if there is turpitude in trading with the brigands, it is equally conspicuous in the conduct of the claimants, in lying in wait to derive a profit from ravages on our commerce, and in the clandestine manner in which the property was transferred from one of these vessels to the other. That the property of the libellants could not be devested by the capture, or carrying *infra presidia*, because a sentence of condemnation is indispensably necessary to change the property. That this sentence of condemnation could not operate to produce that effect,

1st. Because the captors, before condemnation, had parted with that possession which alone could give the court its prize jurisdiction over the property.

2d. Because, before the condemnation, this property had actually been brought within the jurisdiction of our own courts, and thus became vested by the *jus postliminii*.

3d. Because the sentence of condemnation appears on the face of it to be inconsistent with every idea of law and justice, inasmuch as the fact was committed before the arrêt was passed which was made the foundation of the sentence.

4th. Because it is in direct violation of the twelfth article of the convention with *France*, inasmuch as the trade to *Port-au-Prince* was a trade to the port of an enemy of *France*, which is sanctioned, under certain restrictions, by that article; and also in violation of the twenty-second article, which enjoins that the adjudication of captured American vessels shall be made by the tribunals of the country into which the prize shall be carried; and of the twentieth article, which prohibits the sale of goods captured before adjudication by competent authority.

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Without considering these arguments in detail, I shall recur to the principles adopted by the district court in its decisions, and afterwards cursorily examine such of the arguments of counsel as shall not appear to me to be disposed of by my previous observations.

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In the decree of September 1804 there are three questions considered.

1st. Whether the libellants could acquire any legal interest by a purchase from the brigands.

2d. Whether the capture and firm possession, without condemnation, could convey a title to the claimants which the court could not violate.

3d. The question of identity. But this last is relinquished on the appeal.

The second question no longer exists, since the production of the condemnation: and on the first I would only remark, that it is too much of a refinement upon the acquisition of property in commercial transactions, especially in the purchase of the products of the earth from the actual possessors and cultivators of the soil. And it is conclusive against the doctrine on this point, insisted on for the claimants, that even the French courts have not ventured to adopt such a principle. But I must here express my dissent from the opinion of my much respected associate in this court, expressed by him in the court below; to wit, "that he had no jurisdiction of the question:" because, whenever a court has jurisdiction of the principal subject of a suit, it must, of necessity, decide upon all questions that occur in the course of investigation, and which have any bearing upon the principal cause of action. Had the libellants never acquired a legal interest in this property, it is clear that their suit must have been dismissed without any inquiry into the subsequent occurrences.

In the decree of the court below of April 1805, the only subject considered was the effect of the decree of condemnation, and it was declared irrelevant upon two grounds.

1st. Because upon the face of it, it appears to have been founded on an ordinance passed subsequent to the commission of the act for which the vessel and cargo were condemned.

2d. Because the property was actually brought within the jurisdiction of the *United States* before the sentence of condemnation was pronounced.

Upon considering the first of these grounds it will be perceived that it supposes two things, viz. that a decree of a foreign court is examinable, and that it derives its validity from its correctness; doctrines which, in my opinion, cannot be maintained,

1805. tained. The respect required to be shewn to the decrees of

Rose foreign tribunals is not founded upon the mere amity of nations.

Himely et al. It has for its foundation that universal equality and independence of all governments from which it results, as *Vattel* observes, that "to undertake to examine the justice of a definitive sentence is an attack on the jurisdiction of him who passed it." It becomes, therefore, an absolute right of nations as universal as the principle on which it depends, and one which we cannot but concede, that "decisions made by the judge of the place, "within the extent of his powers, shall be considered as justly "made." Not being at liberty to lift up, as it were, the mantle of justice cast about their decrees, it is, as to other courts, immaterial what errors it covers. Neither the fallibility of the judge, the perjury of witnesses, nor the oppression and injustice of nations will sanction a deviation from this general rule. And, perhaps, if this doctrine were not deducible from any fixed principle, nations must long since have adopted it from a necessary attention to general convenience; for, otherwise, the sentence I am now considering might again be reviewed in the courts of *Santo Domingo*, and from thence return to our own jurisdiction, after making the circuit of all the courts of Europe.

A question will, no doubt, here suggest itself to those who hear me: are our citizens, then, bound to acquiesce under any species of injustice; and do they sue in vain to our courts for relief? The answer is, while our government makes one of the society of nations, we are bound to submit to the obligation of those rules which that society have assumed for their conduct; rules which are founded in truth and wisdom, and, but for the misapplication arising from fraud and flagitious power, are well calculated to produce the best effects.

It is not in our courts that redress is to be sought for the errors and injustice of foreign decisions. Nations pledge to each other the lives and fortunes of their citizens, and even their national existence for the integrity and correctness of their judicial tribunals; "and when justice is refused, or palpable injustice done, or rules and forms openly violated, or an odious distinction adopted to the prejudice of the subjects of another," and negotiation for satisfaction fails, the appeal lies to the *ultima ratio* of nations. The government is bound to extend a protecting arm to her citizens, while confining themselves strictly within the limits of their duty; and to make compensation to them for such injuries as policy may withhold her from representing.

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The jurisdiction of the court of admiralty is of a peculiar nature, acting wholly *in rem*, and not affecting the rights of any persons whomsoever, except so far as they exist in the thing which is the subject of the libel. Its decrees are conclusive against all the world; a doctrine which, as to the right of property in the subject libelled is strictly and universally correct, " whenever the court is erected within the jurisdictional limits of the power which constitutes it, when the subject is of admiralty jurisdiction, and the court professes to sit and judge according to the law of nations and the style of the admiralty."

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Nor must it be supposed that, to produce this effect upon the right of property, the decision of the court must be formed upon a just idea of the law of nations, as applied to any particular case. A decision founded upon an erroneous opinion will be as efficient in that respect as one which flows from the most unerring judgment. It is the thing decreed that courts of justice are to regard, and not the reasons from whence the conclusions were deduced. Governments, indeed, will examine into the correctness of proceedings against their citizens, and will insist upon satisfaction, or dissolve the bonds of peace.

It remains for me to consider the second principle upon which the court below founded the decree of *Afrii* last in favour of the libellant: to wit, " that as the property of the actors was actually brought into their own jurisdiction long before any judicial decision had taken place elsewhere, and as the marshal of this court had custody of it at least three months prior to any such decision, that alone might have been good cause for ordering restitution."

In the argument upon this head, counsel contended that it was the possession alone which could bring the subject within the jurisdiction of the court of admiralty that condemned it. That in parting with the possession by the sale, the court lost its jurisdiction, and could not affect the right of property by their decree. The court below, without adopting this idea in the extent contended for, appears to have acted upon another, namely, that coming within our jurisdiction, it could no longer be subject to the courts of France, and the property revested by the *jus postliminii*.

I am sorry to be here again under the necessity of adopting a different opinion. Mere locality will not, of itself, deprive one court of its jurisdiction, nor give jurisdiction to another. A prize brought into our ports by a belligerent continues subject to the jurisdiction of the capturing power, although the *corpus* be within the limits of another jurisdiction; and it is now the gene-

1805. — ral practice of European nations to condemn in their own courts captured vessels carried into the ports of an ally, or even a neutral.

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Himely et al. On the other hand, a prize brought into our ports would not by that circumstance, be subjected to our jurisdiction, except in the single case of assuming jurisdiction to protect our neutrality; as in the cases of capture within our jurisdictional limits, or by vessels fitted out in our own ports. Nor does it appear to me that the *jus postlimii* can attach in this case, because this capture was not a reprisal upon us as a nation, but upon a single offending individual in the commission of an act not authorized by his nation.

To satisfy the mind on this subject it is necessary to inquire what is the liability of an individual of a neutral state who commits an act inconsistent with his neutrality, or even with the municipal laws of another nation. Hew is the state to which he belongs affected by his conduct, and who is to decide upon the offence with which he is charged? As to the tribunals that are to determine on the offence, there is no longer any difference of opinion among civilized nations. Every nation is the arbiter and vindicator of its own rights; and the courts of the capturing power have exclusive jurisdiction of questions arising on supposed breaches of neutrality, the violation of belligerent rights, or even of municipal laws.

With regard to the liability of individuals charged with those offences, it is proper to observe that, in strictness, every nation is bound to restrain its own citizens from the commission of offences against all other nations. But, as it is impossible, in the present state of things for the most vigilant government to prevent those aggressions which a love of gain and spirit of adventure are hourly producing, nations have agreed in giving up the individual to the consequences of his own temerity, and the offender is now treated as an individual enemy. He is abandoned by his own government, and cannot even claim the rights of war, but from the humanity or policy of his captor.

A consideration which will set this idea in a strong point of view, and shew that he is considered as waging an individual war with the capturing belligerent is that, if he escapes, or rescues his vessel, after the capture, he is never demanded of his government, but avoids the danger as any other enemy would in similar circumstances.

If an American vessel, charged with a breach of neutrality, should be captured by a belligerent beyond our jurisdictional limits, and, before condemnation, should be driven into one of our

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our ports either by stress of weather or pursuit of an enemy, will it be contended that this court can interfere to devest the captor of his possession? It must be recollectcd that such an attempt would draw to this court the jurisdiction of a question which it is the acknowledged right of the belligerent to have decided by his own tribunals. Therefore, in the case of a neutral captured under the charge of breach of neutrality, the *jus post*hostis** can only attack in case of rescue or recapture; and his nation cannot interfere to restore that possession which he has lost by the capture, without becoming a party in the contest. She regards the individual and capturing power as belligerents, between whom she is bound equally to observe the laws of neutrality, and particularly to consider possession as the criterion of right, at least while the cause of capture is in its progress to adjudication.

It will be perceived how large a portion of the argument went to justify, or condemn, the trade in which this vessel was engaged; the one side contending that the libellants had committed no act for which the vessel was liable to condemnation: the other, that they had a question which is exclusively cognizable in the courts of the capturing power, but which this court would be compelled to decide, if the libel be sustained upon a claim interposed on behalf of the captors, or even, I conceive, of their vendee; unless there were reason to contend that the vessel was piratically captured. At the same time I heartily concur in the opinion that, as between neutrals at least, a sentence of condemnation is indispensably necessary to produce a complete devestiture of property; and, unless the neutral property captured be put in train for a legal adjudication, I should think a nation at liberty to seize it, as having been piratically taken. For the capturing power is bound to satisfy a neutral nation that she had a right to attack her citizen; and it will be found, upon reflection, that this cannot be satisfactorily done in any other mode than by a decree of her tribunals of justice.

Much has been said about the different modes adopted by European nations respecting the devestiture of property captured. These rules were universally adopted by the respective nations to regulate the claims of their own citizens in questions of salvage and restitution. In case of alliance in war, each nation extended to its ally the benefit of a rule which ascertained the rights of its own citizens; and the correctness of these rules was mere matter of speculation, not affecting the interests of neutrals, until Great Britain thought proper, in the last war, to exact a salvage on the recapture of neutral property.

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1805. There appear to me to remain but two points made by counsel on which it may be necessary for me to remark.

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Himely et al. 1st. How far the sentence of condemnation would affect the property after the sale.

2d. Whether the whole transaction was not inconsistent with the treaty subsisting between the two nations, and therefore produced no change of property.

In the case of *Sheaff and Turner v. a Parcel of Sugars*, decided in this district court in the year 1800, in favour of the purchasers, and confirmed on appeal to the circuit court, the property captured was carried into the *Havanna* and libelled and condemned in a French court sitting at the *Cape*. The sale also took place prior to the condemnation.

It was indeed asserted in that case, as in this, that the sale was made with consent of the captain; but there was no evidence to prove it. In two important features, then, these cases are parallel, and I might rest my opinion as to this point on precedent alone. But it affords me more satisfaction to be able to decide on principle also. As the sale was not made by order of a competent tribunal, and was made by the captors at a time when their right was not consummated by a judicial decision, the claimant, in this case, could have acquired no more than an inchoate right, subject to be confirmed or defeated by the event of the decision of the court to which the cause was referred. That is, he acquired no greater interest than that of the captor from whom he purchased. Had the decision been against the captors, with the evidence now before me I should not hesitate to decide in favour of restitution; but by the decree of condemnation the government of *France* has made the act of capture its own, and all questions of individual interest are at an end.

The whole of the arguments founded on the violation of the treaty is subject to the general objection, that they lead to a revision of the decree of a foreign tribunal. The French courts are bound by the convention with *France*, and it is to be presumed that they bear it in mind in their decision. They possess the same power in construing its meaning and effects that we do; and though their opinion may be erroneous, their decree would not therefore be vitiated.

With regard to the ground of argument drawn from the 12th article, to wit, that *Port-de-Paix* is the port of an enemy of *France*, and therefore a trade with it is sanctioned by that article, I think it totally incorrect in point of fact. *France* has not yet relinquished the contest; and, until she does, I must think that all the ports of that island are still ports of *France*; that she possesses

sesces a right to exclude all commerce with them; and to affix a penalty for breach of this exclusion. There is a peculiarity in the unhappy conflict raging in that devoted island, which should make us hesitate in applying to it the rules of war as between independent nations. *Great Britain*, deeply interested as she is in distressing and embarrassing *France*, has not ventured to apply the laws of war to this newly erected empire. On the contrary, she condemns our vessels carrying contraband of war to the brigand ports, as if to the ports of her enemy, although, in fact, they are carried to the most inveterate enemies of her rival.

As the 20th article of the convention relates only to capture for carrying contraband of war to an enemy's port, I shall pass it over without any observations; and shall close with a few remarks on the 22d article, the last noticed in the argument.

The first clause of this article, and the only one relative to this case, is in the following words: "It is further agreed, that "in all cases, the established courts for prize causes, in the "country to which prizes may be conducted, shall take cognizance of them." It strikes me upon an attentive consideration of this article, that the only object of it was a recognition of the established doctrine that the courts of the capturing power shall judge of the legality of capture; and to add the very necessary provisioan that the reasons of condemnation shall be, in all cases, expressed in their decrees. But certainly the words literally taken will produce the inference contended for by counsel, to wit, that vessels captured from our citizens by *France* cannot be condemned except in a French port. It would be absurd to suppose that it was intended to give jurisdiction to the courts of any neutral or ally into whose ports such prizes might be carried. If this were a just construction of the article, it would only follow that a violation of the treaty had been committed for which *France* is bound to make atonement; and that the court of admiralty of *Santo Domingo* was incorrect in proceeding to adjudicate a vessel not lying in their own port: but I conceive that the validity of the decree would be still unshaken. If this article was not brought to the notice of that court, it may well be attributed to the laches of the libellant himself, in not making this defence, nor indeed any other, in a court that was open to his claim. But there is a liberality and candour in the construction of treaties which would make me reject the one here contended for, were it necessary to decide upon it. For, I could never be induced to think that a point of such importance would be left to mere inference, by the able men who negotiated that treaty,

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1805. when it could so easily have been expressed in a single unequivocal sentence.

Rose v. Hinckley et al. Nor do I think that the interest of the neutral would be promoted by a construction subjecting the fair trader to the melancholy inconvenience of detention in some distant port; until he could be safely conveyed to that of the captor for adjudication; or be exposed, perhaps, to the perils of the ocean during a tedious voyage, for the same purpose.

Upon the whole, I am of opinion that the decrees in these cases should be reversed, and the libels be dismissed. But as the claimant purchased before condemnation, and the libellant had a fair claim to this investigation, let each party pay his own costs. See 4 *Cranch*, 241.

Marshall,

Rose v. Hinckley et al. on Appeal from the Admiralty.

MARSHALL, chief justice. This is a claim for a cargo of coffee, which, after being shipped from a port in *St. Domingo* in possession of the brigands, was captured by a French privateer, and was carried into *Barracoa*, a small port in the island of *Cuba* where it was sold by the captor. The cargo having been brought by the purchaser into the state of *South Carolina* was libelled in the court of admiralty by the original American owner. The purchaser defends his title by a sentence of condemnation pronounced by a tribunal sitting in *St. Domingo*, after the property had been libelled in the court of this country, and by an order of sale made by a person styling himself delegate of the French government of *St. Domingo* at *St. Jago de Cuba*.

The question to be decided is,

Was this sentence pronounced by a court of competent jurisdiction? At the threshold of this interesting inquiry a difficulty presents itself which is of no inconsiderable magnitude. It is this:

Can this court examine the jurisdiction of a foreign tribunal? The court pronouncing the sentence, of necessity, decided in favour of its jurisdiction, and if the decision were erroneous, that error, it is said, ought to be corrected by the superior tribunals of its own country, not by those of a foreign country.

This proposition can certainly not be admitted in its full extent. A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self constituted body, or by a body not empowered by its government to take cognizance of the subject which it had decided, could have no legal effect whatever. The power of the court there is, of necessity, examinable to a certain extent by that tribunal, which is compelled to decide, whether its sentence have changed the right of property. The power under which it acts must be looked into: and its authority to decide questions which it professes to decide must be considered. But although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the situation of the particular thing on which the sentence has passed, may be inquired into, for the purpose of deciding whether that thing were in a state which subjected it to the jurisdiction of the court passing the sentence. For example, in every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal

1805. tribunal to act, as a prize court, must be examinable. Is the question, whether the vessel condemned were in a situation to subject her to the jurisdiction of that court, also examinable? The question, in the opinion of the court, must be answered in the affirmative.

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Himely et al.

Upon principle it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it would not be contended that the condemnation operated a change of property. Upon principle then it would seem, that, to a certain extent, the capacity of the court to act on the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.

Passing from principle to authority, we find that in the courts of *England*, whose decisions are particularly mentioned, because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as is given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive, with respect to what is proper to decide, is uniformly qualified with the limitation, that in the given case it has jurisdiction of the subject-matter.

This general *dictum* is explained by particular cases,

The case of the *Flad Oyen*, 1 Rob. 114. was a vessel condemned by a belligerent court, sitting in a neutral territory. Consequently the objection to that sentence turned entirely on the default in the constitution of the court. The *Christopher*, 2 Rob. 173. was condemned while lying in the port of an ally; the jurisdiction of the court passing the sentence was affirmed, but no doubt seems to have been entertained at the bar, or by the judge himself, of his right to decide the question, whether a court of admiralty, sitting in the country of the captor, could take jurisdiction of a prize lying in the port of an ally. The decision of the tribunal of *Bayonne*, in favour of its own jurisdiction, was not considered as conclusive in the court of admiralty in *England*; but that question was treated as being perfectly open and as depending on the law of nations. The case of *Kialighet*, 3 Rob. 82. is of the same description with that of the *Christopher*, and establishes the same principle. In the case of *Hendrick and Maria*, 4 Rob. 35. Sir *William Scott* determined that a condemnation, by the

the court of the captor, of a vessel lying in a neutral port, was 1805.
conformable to the practice of nations, and therefore valid; but
in that case the right to inquire whether the situation of the
thing, the *locus in quo*, did not take it out of the jurisdiction of
the court, was considered as unquestionable. Himley et al.
v.
Rose

The case of the *Comet*, 5 Rob. 255. stands on the same principles. The *Helena*, 4 Rob. 3. was a British vessel, captured by an Algerine corsair owned by the dey, and transferred to a Spanish purchaser by a public act, in a solemn manner before the Spanish consul. The transfer was guaranteed by the dey himself. The vessel was again transferred to a British purchaser, under the public sanction of the judge of the vice admiralty court of *Minorca*, after that place had surrendered to the British arms. On a claim in the court of admiralty, by the original British owner, Sir *William Scott* affirmed the title of the purchaser, but expressed no doubt of the right of the court to investigate the subject.

The manner, in which this subject is understood in the courts of *England*, may then be considered as established on uncontrollable authority. Although no case has been found, in which the validity of a foreign sentence has been denied, because the thing was not within the ports of the captor, yet it is apparent, that the courts of that country hold themselves warranted in examining the jurisdiction of a foreign court, by which a sentence of condemnation has passed, not only in relation to the constitutional powers of the court, but also in relation to the situation of the thing on which those powers are exercised; at least so far as the right of the foreign court to take jurisdiction of the thing is regulated by the law of nations and by treaties. There is no reason to suppose that the tribunals of any other country whatever deny themselves the same power. It is therefore, at present, considered as the uniform practice of civilized nations, and is adopted by this court as the true principle which ought to govern in this case.

In pursuing the inquiry then, whether the tribunal erected in *St. Domingo*, were acting on a case of which it had jurisdiction, when the *Sarah* was condemned, this court will examine the constitutional powers of that tribunal, the character in which it acted, and the situation of the subject on which it acted.

Admitting that the ordinary tribunal erected in *St. Domingo* was capable of acting as a prize court, and also of taking cognizance of offences against regulations purely municipal, it is material to inquire, in which character it pronounced the sentence of condemnation, in the case now under consideration. In

1805.

making this inquiry, the relative situation of *St. Domingo* and *France* must necessarily be considered.

Mose
v.
Himely et al.

The colony of *St. Domingo*, originally belonging to *France*, had broken the bond which connected her with the parent state, had declared herself independent, and was endeavouring to support that independence by arms. *France* still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto* then unquestionably existed between *France* and *St. Domingo*. It has been argued that the colony having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact, and as being entitled to maintain the same intercourse with the world, that is maintained by other belligerent nations. In support of this argument, the doctrines of *Vattel* have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide whether they will consider *St. Domingo* as an independent nation; and until such decision shall be made, or *France* shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of *France* over that colony as still subsisting.

It is not intended to say that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign who is endeavouring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If as a legislator he publish his law, ordaining punishments for certain offences, which law is to be applied by courts, the nature of the law, and of the proceedings under it, will decide whether it be an exercise of belligerent rights, or exclusively of his sovereign power, and whether the court, in applying this law to particular cases, acts as a prize court, or as a court enforcing municipal regulations.

Let the acts of the French government which relate to this subject be inspected.

The notification given by Mr. *Pichon*, the French charge des affaires to the American government, which was published in March 1802, interdicts all manner of intercourse with the ports of *St. Domingo*, in possession of the revolted negroes, and declares that cruizers will arrest all foreign vessels attempting to enter any other port, and to communicate with any of the revolted negroes, to carry either ammunition or provisions to them. Such vessels,

vessels, he adds, shall be confiscated, and the commanders severely punished, as violating the rights of the French republic and the law of nations.

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It might be questioned, under this notice, whether vessels sailing on the high seas, having traded with one of the brigand ports, would be considered as liable to seizure and to confiscation, after passing the territorial jurisdiction of the government of *St. Domingo*. A free trade with that colony had been allowed, and the revocation of that license is made known to the government of the *United States*. To its revocation, the ordinary rights of sovereignty were sufficient.

The notification, however, refers to the orders of the commander in chief of the French republic in *St. Domingo*, and that order should of course be examined as exhibiting more perfectly the extent and nature of the rights which the French republic purposed to exercise.

The particular order which preceded this notification is in these words: "Every vessel, French or foreign, which shall be found by the vessels of the republic riding at anchor in the ports of the island not designated by these presents, or within the bays, creeks and landing places on the coast, or under sail at a less distance than two leagues from the coast and communicating with the land, shall be forfeited." The next decree is dated the 23d of *June* 1802, and the extract, which is supposed to regulate this particular subject, is in these words: "Every vessel, French or foreign, which shall be found by the vessels of the republic, anchored in one of the ports of the island not designated by the present decree, or in the bays, coves or landings of the coast, or under sail at a distance less than two leagues from the coast and communicating with the land, shall be arrested and confiscated."

Nothing can be more obvious than that these are strictly territorial regulations, proceeding from the sovereign power of *St. Domingo*, and intended to enforce sovereign rights. Seizure for a breach of this law is to be made only within those limits, over which the sovereign claimed a right to legislate, in virtue of that exclusive dominion, which every nation possesses within its own territory, and within such a distance from the land as may be considered as a part of its territory. This power is the same in peace and in war, and is exercised according to the discretion of the sovereign. The prohibition and the penalty are the same on French and foreign vessels.

This subject was again taken up in *October* 1802, in an arrêt which in part regulates the coasting trade of the island. The 4th,

5th

1803.

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Hinckley et al. 5th and 6th articles of this decree respect foreign as well as French vessels, and subject them to confiscation, in the cases which are there enumerated. These are all of the same description with those stated in the arrêt of the 22d of June, and no seizure is authorized but of vessels found within two leagues of the coast.

The last decree is that which was issued by general *Ferrand*, on the 1st day of *March* 1804. This deserves the more attention, because it is that on which the courts profess to found their sentence of condemnation in the particular case under consideration, and because general *Ferrand* uses expressions which clearly indicate the point of view in which all these arrêts were contemplated by the government of the island.

The title of the arrêt is "An Arrêt, relative to vessels taken in contravention of the dispositions of the laws and regulations concerning French and foreign commerce, in the colony."

In stating the motives for this ordinance, it is said, "that some French agents, in the neighbouring and allied islands, had mistaken the application of the laws and regulations concerning vessels, taken in contravention upon the coasts of *St. Domingo*, occupied by the rebels, and had confounded those prizes with those which were made upon the enemy of the state."

"Desiring to put an end to all the abuses which might result from this mistake, and which would be as injurious to the territorial sovereignty, as to the rights of neutrality," the commander in chief, after some further recitals, which are not deemed material, ordains the law under which the tribunals have proceeded.

The distinction, between seizures made in right of war and those which are made for infractions of the commercial regulations, established by the sovereign power of the state, is here taken in terms; and that legislation, which was directed against vessels contravening the laws and regulations concerning French and foreign commerce in the colony, is clearly of the latter description.

The first article of this ordinance is recited in the sentence, as that on which the condemnation was founded. It is in these words: "The port of *St. Domingo* is the only one in the colony of *St. Domingo*, that is open to the French and foreign commerce; in consequence, all vessels anchored in the bays, harbours and landing places on the coast occupied by the rebels, those cleared for the ports in their possession coming out with or without a cargo, and generally all vessels sailing in the territorial extent of the island, (except that from cape *Raphael* to *Ocoa* bay) found at a distance less than two leagues from the coast, shall be retained by the state vessels and privateers having out

out letters of marque, who shall conduct them, if possible, into the port of *St. Domingo*, that the confiscation of the said vessels and cargoes may be pronounced."

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As this article authorizes a seizure of those vessels only which are "sailing within the territorial extent of the island, found within less than two leagues of the coast;" it is deemed by the court to be sufficiently evident that the seizure and confiscation are made in consequence of a violation of municipal regulations and not in right of war. It is true that the revolt of the colony is the motive for this exercise of sovereign power. Still it is an exercise of sovereign power restricting itself within those limits which are the province of municipal law, not the exercise of a belligerent right.

The tribunal professing to carry this law into execution, though capable of sitting either as a prize or an instance court, must be considered in this case, as acting in the character of an instance court, since it is in that character that it punishes violations of municipal law.

The *Sarah* was captured more than ten leagues from the coast of *St. Domingo*, was never carried within the jurisdiction of the tribunal of that colony, was sold at *Barracoa* in the island of *Cuba*, and afterwards condemned as prize under the arrêt of general *Ferrand* which has been stated.

If the court of *St. Domingo* had jurisdiction of the case, its sentence is conclusive. If it had no jurisdiction, the proceedings are *coram non judice*, and must be disregarded.

Of its own jurisdiction, so far as it depends on municipal rules, the court of a foreign nation must judge, and its decisions must be respected. But if it exercise a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all.

Thus the sentence of a court, sitting in a neutral territory and instituted by a belligerent, has been declared not to change the property it professed to condemn; and thus the question, whether a prize court sitting in the country of the captor could condemn property lying in a neutral port, has been freely examined; and although the jurisdiction of the court in such case was admitted, yet no doubt appears to have been entertained of the propriety of examining the question, and deciding it according to the practice of nations.

Since

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Since courts which are required to decide, whether the condemnation of a vessel and cargo by a foreign tribunal have effected a change of property, may inquire whether the sentence were pronounced by a court which, according to the principles of national law, could have jurisdiction over the subject, this court must inquire whether, in conformity with that law, the tribunal sitting at *St. Domingo* to punish violations of the municipal laws enacted by its sovereign, could take jurisdiction of a vessel seized on the high seas for infracting those laws, and carried into a foreign port.

In prosecuting this inquiry, the first question which presents itself to the mind is, what act gives an inchoate jurisdiction to a court?

It cannot be the offence itself. It is repugnant to every idea of a proceeding *in rem*, to act against a thing which is not in the power of the sovereign under whose authority the court proceeds, and no nation will admit that its property should be absolutely changed, while remaining in its own possession by a sentence which is entirely *ex parte*. Those on board a vessel are supposed to represent all who are interested in it, and if placed in a situation which requires them to take notice of any proceedings against a vessel and cargo, and enables them to assist the rights of the interested, the cause is considered as being properly heard, and all concerned are parties to it. But the owners of vessels navigating the high seas or lying in port, cannot take notice of any proceedings which may be instituted against those vessels in foreign countries; and consequently such proceedings would be entirely *ex parte*, and a sentence founded on them never would be, and never ought to be regarded.

The offence then alleged to have been committed by the *Sarah* could not be cognizable by the court of *St. Domingo*, until some other act were performed, which should make the owners of the vessel and cargo parties to the proceedings instituted against them, and should place them within the legitimate power of the sovereign, for the infraction of whose laws they were to be confiscated. There must be a seizure in order to vest the possession of the thing in the offended sovereign, and enable his courts to proceed against it. This seizure, if made either by a civil officer or a cruizer, acting under the authority of the sovereign, vests the possession in him, and enables him to inquire by his tribunals constituted for the purpose, into the allegations made against and in favour of the offending vessel. Those interested in the property which has been seized are considered as parties to this inquiry; and all nations admit that the sentence, whether correct or otherwise, is conclusive. Will a seizure *de facto*, made without

without the territorial dominion of the sovereign under cover of whose authority it is made, give a court jurisdiction of a thing never brought within the dominion of that sovereign?

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This is a question on which considerable difficulty has been felt, and on which some contrariety of opinion exists. It has been doubted whether proceedings denominated judicial are in such a case merely irregular or are to be considered as absolutely void, being *coram non judice*. If merely irregular, the courts of the country pronouncing the sentence were the exclusive judges of that irregularity, and their decision binds the world; if *coram non judice*, the sentence is as if not pronounced.

It is conceded that the legislation of every country is territorial; that beyond its territory it can only effect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law, without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.

If these propositions be true, a seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign cannot authorize. The person who makes this seizure there, makes it on a pretext, which if true, will not justify the act; and he is a marine trespasser. To a majority of the court it seems to follow that such a seizure is totally invalid; that the possession acquired by the unlawful act is his own possession, not that of the sovereign; and that such possession confers no jurisdiction on the court of the country to which the captor belongs.

This having been the fact in the case of the *Sarah*, and neither the vessel nor captain, supercargo nor crew having ever been brought within the jurisdiction of the court or within the dominion of the sovereign whose laws were infacted, the jurisdiction of that court over the subject of its sentence never attached, the proceedings were entirely *ex parte*, and the sentence is not to be regarded.

The case of the *Helena* already cited may, at first view, be thought a case which would give validity to any seizure wherever made, and would refer the legality of that seizure solely to the sovereign of the captor. But on a deliberate consideration of that case, the majority of the court is of opinion, that this inference is not warranted by it. Several circumstances were concerned in producing

1805. producing the decision which was made, and those circumstances vary that case materially from this.

Rose The captured vessel was carried into port, and, while in the power of the sovereign, was transferred by his particular authority in solemn form. In such a case Sir *William Scott* conceived, that a sentence of confiscation conformably with the laws of *Algiers* was to be presumed. But his decision did not turn singly on this point. The vessel, after passing in this formal manner to a Spanish purchaser, had, with equal solemnity, been again transferred to a British purchaser; and the judge considered this second purchaser, with how much reason may perhaps be doubted, as in a better situation than the original purchaser.

This case is badly reported; the points made by counsel on one side are totally omitted: and the opinion of the judge is not given with that clearness which usually characterizes the opinions of Sir *William Scott*. But the seizure was presumed to be made by way of reprisal for some breach of the treaty between the two powers; so that the possession of the captor was considered as legitimately the possession of his sovereign; and from the subsequent conduct of the dey himself, a condemnation according to the usages of *Algiers* was presumed. But in presuming a condemnation, this case does not, it is thought, dispense with the necessity of one; nor is it supposed in presuming a legitimate cause of seizure, to declare that a seizure made without authority by a commissioned cruiser, would vest the possession in the sovereign of the captor, and give jurisdiction to his courts.

If this case is to be considered as if no sentence of condemnation were ever pronounced, the property is not changed; and this court having no right to enforce the penal laws of a foreign country, cannot inquire into any infraction of those laws. The property in this particular case was purchased under circumstances which exclude any doubt respecting its identity, and respecting the full knowledge of the purchaser and of the nature of the title he acquired.

The sentence of condemnation being considered as null and invalid, the property is unchanged, and therefore ought to be recovered by the libellants in the court below. But those libellants ought to account with the defendants for the freight, insurance and duties on importation, and for such other expenses as would have been properly chargeable on themselves as importers; and each party is to bear his own costs.

The sentence of the circuit court is reversed, and also the sentence of the district court so far as it contravenes this opinion; and the cause is to be remanded to the circuit court for the district of *South Carolina* for a final decision thereon.

APPENDIX.

JUDGMENTS

IN THE

Admiralty Court of Pennsylvania.

HON. FRANCIS HOPKINSON, JUDGE.

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JUDGMENTS

IN THE

Admiralty Court of Pennsylvania.

Liebart, Baes, Durdeyn and Co. v. The Ship Emperor. 1785.

July.

JUDGMENT. This is a suit brought on a bottomry bond given by *John Walsh* to the libellants at *Ostend*, whereby he hypothecates the ship *Emperor*, of which he was then the captain, for 4500 florins, or *409l. 1s. 9d.* sterling money of *Great Britain*, advanced for repairs of the said ship. Whereupon *James Oellers*, the owner of this ship, and others his assignees, come in and answer to the libel, alleging that this bottomry bond ought not to take effect as an hypothecation, according to the maritime law.

The power vested in a master of a vessel to impawn his owner's ship or goods for necessaries furnished in a foreign port, is a legal indulgence founded on the urgency of the case, and for the general benefit of commerce.

There are few rules of law more strictly defined than this of hypothecation, and none in which the reason and intention of the law are more manifest. It is thus delineated:

"A master

1785. “ A master of a ship hath no power to take up me-
 Liebart et al. “ ney by bottomry, in places where his owner or own-
 v.
 Ship
 Emperor. “ ers dwell”—“ But when a master is out of the coun-
 try, and where he hath no owners, nor any goods of
 “ their's, nor of his own, and cannot find means to
 “ take up by exchange or otherwise, and that for want
 “ of money the voyage might be retarded or over-
 “ thrown, moneys may be taken up upon bottomry.”
Molloj, b. II. c. 11. s. 11.—“ And the money so taken
 “ up by the master, is done upon great extremity, and
 “ that for the completing of the voyage, when they are
 “ in distress and want in some foreign parts.”—s. 12.

All the books agree in the spirit of this doctrine. The extreme necessity appears, every where, to be the *reason* of the law, and the *intention*, to favour commerce.

Let us now take a view of the circumstances of the present case.

The leading facts appear, from the testimony exhibited, to be these.

The ship *Emperor*, *John Walsh* master, belonging to *James Oellers* of *Philadelphia*, sailed for *Ostend* with a cargo of tobacco on board; the ship and cargo being consigned by the owner to *Bine, Overman and Co.* merchants at *Ostend*. This ship was so damaged by a storm at sea, that the captain was obliged to put into the port of *Dover*, in *England*, in distress. The captain on his arrival at *Dover*, immediately sent notice of his situation to the consignees at *Ostend*, and they speedily furnished him with a credit on *London*, from which he raised money sufficient to refit his ship. After this, he sailed for and arrived at *Ostend*, where the consignees took charge of the ship and cargo.

Before the vessel arrived at *Ostend*, *Bine, Overman and Co.* had accepted bills, to a considerable amount, drawn upon them by *Oellers*, on the credit of this consignment. Upon closing all accounts, *Bine, Overman and*

and Co. found that *Oellers* had not only drawn upon them to the full amount of the cargo and freight, ("the tobacco not selling so well as was expected,") but that there remained a considerable balance in their favour.

1785.

Liebart et al.
v.
Ship
Emperor.

To secure this balance, they tell captain *Walsh* that he shall not leave the port, and even threaten to attach the ship, unless he will repay them the moneys advanced at *Dover* for repairs, or hypothecate the ship, for security. It was not in captain *Walsh's* power to do the one, that is, to repay the money, and he declined the other proposal for some time. But finding expenses accumulating, and that he could not sail without some accommodation, he at last consented to hypothecate the ship. *Bine, Overman and Co.* then recommended him to *Liebart, Baes, Durdeyn and Co.* telling him that *they* would lend money on bottomry; and conducted him to their house, where he executed the bottomry bond, now in question. But no money was paid to *Walsh*; for the bills for repairs, for which the ship was hypothecated, had long since been discharged by the produce of the credit on *London*.

After this, *Bine, Overman and Co.* permitted captain *Walsh* to sail, and in due time he arrived in the port of *Philadelphia*.

During these transactions, *Oellers* had failed, and assigned this ship to his creditors, and the question now is, Whether this bottomry bond shall operate to the exclusive security of the merchants at *Ostend* against all other creditors, as a genuine hypothecation would do, on the principles of maritime law.

After a careful consideration of these circumstances, I cannot discover one real feature of that rule of law, which should be the ground of the present suit. True it is that the ship was in necessity, and so is every ship that wants essential repairs. But the owner had credit within reach. The consignees were not far distant. The application was easy and certain, and the consignees

1785. consignees no sooner heard of the disaster but they ^{Liebart et al.} furnished the means of relief. In fact, *Bine, Overman and Co.* had the strongest inducements to exert themselves in getting the ship repaired at *Dover*, to enable her to get round to *Ostend*, for they had made themselves answerable for *Oellers*' bills, upon the credit of this cargo; it was, therefore, of great importance to them that the cargo should arrive safe to their hands. So that, instead of advancing money to a distressed stranger, they were only taking care of their own security. This motive is manifested by their letter to *Walsh* at *Dover*, and still further by their subsequent conduct; for, after they had disposed of the cargo, and found a balance due from *Oellers* to them, they insist that *Walsh* shall not sail unless he will hypothecate the ship to *Liebart, Baes, Durdeyn and Co.* which, from all appearances, seems to be the same thing as hypothecating her to themselves. For the captain received no money from *Liebart, Baes, Durdeyn and Co.* who were not at all interested in the transaction, and whose names were only made use of to save appearances; for *Bine, Overman and Co.* well knew that, being consignees, the captain had no power to hypothecate the vessel to them. And, in order to give the bottomry bond the appearance of a genuine hypothecation, they select from the general account the moneys spent in repairs at *Dover*, and compel the captain to hypothecate the ship, *as for those particular charges*, to the libellants, who had not advanced one shilling towards that expense.

Further, if we look into the accounts we shall find, that although this voyage was not a very successful one, yet the ship cleared all charges accrued since she sailed from *Philadelphia*, even including the repairs at *Dover*. But *Oellers* had drawn upon *Bine, Overman and Co.* on the credit of the future voyage, long before the vessel sailed from *Philadelphia*, to raise money

ney to fit her out, and it is these drafts brought into 1785.
account which make a balance due to the consignees. Liebart et al.
So that, instead of an hypothecation made to enable a
ship to complete her voyage, it was, in fact, made to
enable her owner to begin one. Which was never the
object of the maritime law in cases of hypothecation.
Neither was this law ever designed to give partial ad-
vantages in mercantile connexions, or intended to se-
cure the balance of a running account between owners
and consignees.

Ship
Emperor.

The importance of the present decision to the com-
mercial character of our country has been strongly
urged, in favour of the libellants. But I am not appre-
hensive on this account. The question in view is not
to be determined by any municipal law of the coun-
try, but by a general law, universally received and
understood. And I am of opinion, that our national
character would much more suffer by an adjudged
precedent, which might open a door for dangerous
collusions, by putting it in the power of captains of
vessels to saddle their owners with unnecessary en-
gagements, or to give an unfair advantage to foreign
creditors, by a fraudulent use of that preeminent lien
which the law lays on a ship and goods properly hypo-
thecated.

I do not mean to suggest that there has been any
fraud or collusion in the present case. It is enough
that I do not find the claim of the libellants within the
spirit or intention of the maritime law.

And, therefore, I adjudge that the bill be dismissed,
and that the libellants pay the costs of suit.

From

1785. From this decision there was an appeal to the high court of errors and appeals. The cause was again argued there, but the judgment of the court of admiralty was confirmed.

Liebart et al.
Ship
Emperor.

The following notes, taken at the time, contain the substance of the judgment given in the high court of errors and appeals in the above cause.

October 3, 1785.

The court observed, that the power of a master to hypothecate his owner's ship was a necessary, but sometimes a dangerous power: the court was unwilling to extend this power farther than the law strictly authorized. A genuine hypothecation ought to be the voluntary act of the master at the time when, and in the place where, the moneys were advanced for necessities or repairs. The money advanced ought to be solely on the faith of the hypothecation, and not on any personal credit. These are incontrovertible principles—the present case not applicable to them. Although the hypothecation was made to *Liebart, Baes, Durdeyn and Co.* yet it was to secure moneys advanced by *Bine, Overman and Co.* the consignees. No authority shewn, and none can be shewn, because none ought to be, that an hypothecation can be made to a consignee: great mischiefs might arise if captains could hypothecate to consignees. No authority produced to prove that an hypothecation can be made in any port but that in which the vessel first arrives after the distress and damage sustained. *Bine, Overman and Co.* did not repair the vessel on the faith of the hypothecation; but this hypothecation was made to secure to consignees the balance of a running account.

The court unanimous in confirming the sentence of the admiralty.

Turnbull

*Turnbull et al. v. The Ship Enterprise.*1785.
August

JUDGMENT. The bill in this cause is filed by certain merchants against the ship *Enterprise*, for the recovery of moneys advanced by them to the captain of the said ship, in the port of *Philadelphia*, to fit her out for an intended voyage; the ostensible or real owners, or some of them, being, at the time of such advancements, within the state, and known to the bellants.

And it has been urged in support of the libel, that every contract of the captain, for necessaries for a ship, implies an hypothecation, and induces a lien on the ship in favour of the creditor, suable in the admiralty by the rules of civil law. And the case principally relied upon as authority for this doctrine, is cited from *Cowper*, p. 636.

The case referred to is a suit at common law, brought by a ropemaker, against the owners of a ship, for ropes furnished to the captain. The plaintiff, having charged *Harwood* (the captain) and the owners of the ship for the ropes, without naming or knowing who the owners were. The fact was, that the owners, according to the custom of the county of *Essex*, in *England*, where they probably resided, had leased the ship to *Harwood* for a term of years, on certain conditions: and the questions were, whether, under these circumstances, *Harwood* was not both captain and owner, during the term? and whether the original owners ought to be responsible for debts contracted on account of the ship whilst in the possession of *Harwood*, under the lease?

Lord *Mansfield* was of opinion, that neither the lease, nor the ignorance of the creditor, as to the

1785. names or persons of the owners, could exonerate them. And to shew that the owners are bound, he says—" Suppose the ship had been impounded in the admiralty, and *that* had happened at the end of the term, the owners could not have had their ship, without paying the debt for which she had been impounded."

Turnbull
et al.
v.
The Ship En-
terprise.

But this case is brought into view chiefly because lord *Mansfield*, in giving his opinion, observes, that the creditor had three securities for his debt, viz. the person of the captain with whom he contracted, the *specific ship*, and the owners.

It should be remembered, however, that this was a suit at common law: that the owners, the ship, the captain, the creditor, and the contract, were all within the realm; and there can be no doubt but that the creditor might have his action at law either against the persons of the contractors, or might attach their property, the ship, for his debt.

But this case has no reference whatever to the maritime or civil law. The doctrine of hypothecation is never once mentioned, nor is the contract of the captain at all placed upon that ground. The principal object was, to determine whether the lease of the ship did not exonerate the lessors during the term.

So, in the case cited from *Vezey*, p. 154. This also was purely a common law process; wherein the parties and the whole transaction appear to have been *infra corpus comitatus*. "Certainly," says the lord *Chancellor*, "by the maritime law the master has power to hypothecate the ship *during the voyage, and from the necessity of the case*; but it is different where the ship is *infra corpus comitatus*, and the contract made by the owners or master on land, and not arising from necessity—then, the laws of the land must prevail." And this is clearly consonant with the whole current of authorities respecting the doctrine of hypothecation,

hypothecation, viz. that it must be made during the voyage, and from the necessity of the case.

When money is borrowed on the ship, before the voyage begun, the ship is not answerable in the admiralty, 1 *Raym.* 578. So, in 2 *Raym.* 982, in the case of *Johnson v. Shippen*, chief justice *Holt* says—" If a ship be hypothecated before a voyage begun, *that is* not a matter within the jurisdiction of the admiralty; for it is a contract made here, and the owners can give security to perform the contract."

It appears, then, to be a settled doctrine, that a ship cannot be hypothecated, according to the maritime law, before the voyage is begun, or in places where the owners reside, even for those necessaries, without which the ship could not proceed to sea. The law means to favour the completion, not the commencement of a voyage.

For this reason, the legislature of *Pennsylvania* hath, by a special act, given to the artificers who build or repair, and to those who furnish necessaries to fit out a ship for sea, a lien upon the vessel, suable in the admiralty, before the voyage is begun, because the maritime law does not extend to their security.

Since, then, it appears that the advance of moneys to fit out the ship *Enterprize*, was made before the commencement of her voyage, and not from necessity; and that the captain, the owners, or some of them, and the contractors, were all within the state at the time of the transaction; and as the suit is not brought under the act of assembly of the 27th of *March* 1784, I cannot admit this case to be of admiralty jurisdiction, and, therefore, I adjudge that the bill be dismissed, and that the libellants pay the costs of suit.

Edward

1785.

Turnbull
et al.
v.

The Ship En-
terprise.

*Edward Forbes v. The Brig Hannah.*1786.
August.*Andrew Hodge, Respondent.*

The true grounds of a maritime hypothecation are the necessities of the case, and the want of personal credit.

Bottomry bonds may be given for security of mercantile or other debts, either in places where the owners dwell, or in foreign places by their order.

JUDGMENT. *Edward Forbes* of *Dublin*, in *Ireland*, has libelled against the brig *Hannah* for the amount of certain bonds of bottomry, which *Francis Lewis*, then captain and principal owner of the vessel, gave as security for moneys advanced by *Forbes*, in the port of *Dublin*, for necessaries, as it is said, for the said brig, and to enable her to complete her voyage.

The circumstances of this case appear, from the testimony, to be as follows:

Francis Lewis, principal owner of the brig *Hannah*, had chartered her to one *Varlo*, for a voyage from *America* to *Dublin*. *Varlo* himself went passenger, with his goods, and *Lewis* was captain for the voyage. After their arrival at *Dublin*, *Lewis* borrowed money of *Forbes* at three several times; for which he gave three bonds of bottomry on his vessel, amounting, with premium and charges, to 214*l.* 0*s.* 8*d.* sterling money of *Great Britain*. *Forbes* then put a cargo on board the brig, in which it seems that *Lewis* was concerned; as he was to have one half of the net profits of the adventure, exclusive of freight, and to be answerable for one half of the loss, if any there should be, on the sales. *Lewis* left *Dublin* with this cargo, bound for the city of *Boston*, in *America*. But it does not appear by the exhibits, whether he ever arrived at *Boston*, or what he did with the cargo. It appears, however, that in *April* last he was with this brig in the port of *Philadelphia*, at which time his mariners sued in this court for wages due, and the brig was thereupon attached and condemned for payment of wages, amounting to 29*l.*, *Lewis* making no plea or defence against the libel. In consequence of this sentence, a writ

writ issued to the marshal, in the usual form, directing him to sell the brig *Hannah*, with her tackle, apparel and furniture, *or such parts thereof*, as might be necessary to satisfy the decree in favour of the mariners, together with the costs and charges of suit. But *Lewis* requested the marshal to sell *the whole* of the vessel, with her tackle, &c. under the decree, and even indorsed this request upon the writ of sale: and to prove that he was the sole owner of the brig at that time, he exhibited to and lodged with the marshal, an assignment, or bill of sale, from one *Simpson*, who had been a part owner, of all his interest in the brig to *Lewis*. *Andrew Hodge*, the respondent in the present cause, purchased this vessel at the marshal's sale, and paid down the full consideration money, out of which the marshal deducted the mariner's wages and costs of suit, and paid the balance to *Lewis*, as sole owner. After this, *Lewis* went off without saying any thing of the bottomry bonds he had given to *Forbes* in *Dublin*. And now these bonds have come over, and *Forbes* has attached the brig in the hands of *Hodge*, the purchaser.

From these circumstances, two questions have arisen, viz.

1st. Whether these bottomry bonds have hypothesized the vessel, according to the rules of maritime law, so as to bring the cause within admiralty jurisdiction?

2d. Supposing it to be so, whether the sale and purchase, under the authority of this court, have not vested the property in the respondent, exonerated of all prior engagements?

To determine the first point, it will be necessary to consider the characteristic marks which distinguish an hypothecation according to the maritime law, from a common bottomry bond or mortgage on a ship, according to the custom of merchants, and cognizable by the common law.

By

1786.

Edward

Forbes

v.

Brig *Hannah*.

1786.

*Edward
Forbes
v.
Brig Hannah.* By the maritime law, "a master of a ship hath no power to take up money by bottomry, in places where his owners dwell: but when he is out of the country, and where he hath no owners, or any goods of theirs or his own, and cannot find means to take up by exchange or otherwise, and that for want of money the voyage might be retarded or overthrown, moneys may be taken up upon bottomry." *Mollov*, b. ii. c. 11. s. 11. From this it appears, that the true grounds of a maritime hypothecation are, the necessities of the case, and the want of personal credit. Wherever this doctrine occurs in the books, these two circumstances are strongly pointed out. Thus, in 3 *Mod.* 244., "The reason of the civil law, which allows the pawning of a ship for necessaries upon the high sea, seems to be plain; because there may be an extraordinary and invincible necessity, to which the admiralty jurisdiction is limited; for, if the law should be otherwise, the master might take as much money as he will." And so the court, in that case, ordered a trial on the necessity.

So also in *Bridgeman's* case, *Hob.* 12., a prohibition was granted, because the impawning was not shewn to be occasioned by necessity. In 1 *Magens*, there is a report of an admiralty suit on a bottomry bond: at the conclusion, p. 329., the author says, "Persons living in seaports may learn from this case, not to believe or trust too easily a captain they do not know; and when they propose benefiting themselves by lending money on bottomry, to such whose distresses oblige them to seek it: the lenders, for their own satisfaction and security, ought to have proofs given that there was a necessity for such an advance, and that the money had actually been employed for the purposes alleged."

Further, the impawning must be in foreign parts; that is, where neither the owner, nor master, hath any personal

personal credit. For, this constitutes an essential part of the necessity. "The master can have no credit abroad, but by hypothecation." *Salk.* 35. "Where a ship in distress is forced into any port where her owners have no correspondents to supply the master with the money necessary to enable him to prosecute his voyage, he may take it on bottomry from those who will advance it on the easiest terms."

1 Mag. 27.

The reason is, the maritime law requires that the moneys should be lent solely on the credit of the ship; and that the security of the lender should depend altogether on her safety; and, therefore, if the ship be well engaged, that is, according to the principles stated, she shall be for ever obliged till redemption. *Mollov,* b. ii. c. 2. s. 15. And, therefore, also, because of the hazard, an unusual interest or premium is allowed on the moneys advanced.

Such are the principles which designate a maritime hypothecation within admiralty jurisdiction.

But bottomry bonds may be given by owners for security of mercantile or other debts; and these may be executed either in the places where the owners dwell, or in foreign parts by their order. They may be formed under a variety of circumstances, and depend on many contingencies, according to the conditions or terms of the deed or contract.

It should seem, by *the necessity* so frequently urged as the ground of a maritime hypothecation, that the ship should be driven by distress into some other port than that of her destination; or, at least, that some extraordinary casualty should occasion an unforeseen and inevitable expense in the port of her voyage. Because, it is hardly to be supposed that an owner would send his ship, much less that he would take her himself, to a place where he could not command either money or credit for ordinary repairs and supplies.

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In the present case, it does not appear, nor has it ever been suggested, that any extraordinary circumstances occasioned an unforeseen necessity. The captain (*Lewis*), who was also principal owner, arrives after a prosperous voyage, at the port of destination, with his freighter on board. Here the voyage is completed, and it may be presumed that he then received his freight. If so, he could not be without money sufficient to refit his vessel for a new voyage. And that he was not without personal credit is manifest; because *Forbes* entrusted him with a new cargo, and a greed to allow him 35*s.*, Irish money, per ton for freight, on all the goods he should deliver; and also, one half of the net profits arising from the sale of the cargo, he to run one half of the risk of loss. This mercantile connexion shews, at least, that *Lewis* was in some credit with *Forbes*.

Besides, if we look into the accounts, we shall find that the first article charged is for 32*l.* 5*s.* 6*d.* sterling paid to Mr. *Varlo* by *Lewis*'s order, to take up and cancel a former bottomry bond. It seems strange that *Lewis*, after navigating *Varlo* and his goods across the sea, should fall in his debt. This circumstance is not at all accounted for; but, be it as it may, *Forbes* should certainly have forwarded this former bottomry bond, with an account of the occasion and expenditures for which it was given, that a judgment might have been formed whether it was a proper hypothecation or not; or have shewn that the brig was under condemnation of the admiralty at *Dublin* on account of that bond, and that the 32*l.* 5*s.* 6*d.* was paid for her redemption.

Upon a view of the circumstances of the present case, I do not find them such as the maritime law requires, to constitute a genuine hypothecation, within admiralty jurisdiction. This point being conclusive, it is unnecessary to determine on the second general question.

I adjudge

I adjudge that the bill in this cause be dismissed, 1786.
and that the libellants pay the costs of suit.

Edward
Forbes

v.

There was an appeal from this decree; but the high court of errors and appeals confirmed the sentence. ^{Brig Hannah.}

Manuel Sagas de Canizares v. The Brigantine Santissima Trinidad.

Juan Joseph de Aguire Perez, Owner and Respondent.

JUDGMENT. The libel filed in this cause is in the true grounds of hypothecation are the necessities of the case, and the want of personal credit.

" To the honourable *Francis Hopkinson*, esquire, judge of the court of admiralty of the state of *Pensylvania*;

" The bill of *Manuel Sagas de Canizares* respectfully sheweth: That *Don Juan Joseph de Aguire Perez*, of the city of *Cadiz*, in the kingdom of old *Spain*, now resident in the city of *Philadelphia*, was and is owner of a certain brigantine called the *Santissima Trinidad*; and that *Narisco Sanchez y Serna* was commander of the said brigantine, being thereto properly authorized and appointed, the said brigantine being of the burthen of 120 tons, or thereabouts. That the said *Narisco Sanchez y Serna*, being on the high seas and within the jurisdiction of this court, viz. at the *Havannah*, in the island of *Cuba*, was under the necessity of taking up money on the freight and property of the said brigantine, the said brigantine having suffered by storms and tempests

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Trinidad.* tempests on the high seas, and the crew of the said brigantine being in want of provisions. In consequence whereof, and from the prolongation of the voyage thereby occssioned, the said *Narisco Sanchez y Serna* did then and there, upon the high seas, and within the jurisdiction of this court, borrow from *Santiago Cupisono* the sum of 200 Mexican dollars, equal to the sum of 75*l.* lawful money of *Pennsylvania*; in consideration whereof, the said *Narisco Sanchez y Serna* did, on the 6th day of *June* 1788, on the high seas, and within the jurisdiction of this court, by a certain writing, with the proper hand of the said *Narisco Sanchez y Serna*, then captain, thereto subscribed, (which said writing is here exhibited to this court) contract, covenant and agree with the said *Santiago Cupisono*, and to him did hypothecate the said brigantine, and her freight, in the words following, viz.

[*The contract, in the Spanish language.*]

The meaning and purport of which words are as follows, to wit:

“ Received of Mr. *Santiago Cupisono* the sum of two “ hundred dollars, current money of *Mexico*, for the “ victualling and first expenses of the brigantine, “ which sum I will pay at first sight, in the name of “ the owner *Don Juan Joseph de Aguire Perez*, who “ is in *Philadelphia*: which cash I receive, mortga- “ ging the freight, the brigantine and her rigging, as “ the said *Santiago Cupisono* has lent me the above “ sum for the advantage of the vessel at *Havannah*.

“ June 6th, 1788.

“ *Narisco Sanchez y Serna.*”

“ And afterwards, to wit, on the 13th day of *Au-
gust*, in the year of our Lord last aforesaid, the said *Santiago Cupisono*, by his endorsement on the said writing,

writing,* with his proper hand thereto subscribed, did order the contents to be paid to your libellant.

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Trinidad.

" And your libellant in fact says, that the said brigantine did arrive safely from the port of *Havannah* to the port of *Philadelphia* on the 12th day of *October* in the present year. And the said *Narisco Sanchez y Serna*, the said captain, did not, neither did the said *Don Juan Joseph de Aguire Perez*, owner of the same brigantine, pay, or cause to be paid, to your libellant, the said sum of 200 dollars, or any part thereof, which, according to the true intent and meaning of the said writings, so as aforesaid exhibited, the said *Narisco Sanchez y Serna*, and the said *Don Juan Joseph de Aguire Perez* ought to have paid to your libellant; although your libellant hath demanded the said sum both from the same *Narisco Sanchez y Serna*, the captain, and the said *Don Juan Joseph de Aguire Perez*, the owner, at *Philadelphia* aforesaid.

" And your libellant begs leave further to represent, that your libellant is an able seaman and pilot, well acquainted with the several harbours in the island of *Cuba*, and on the continent of *North America*, and, as such, was shipped on board the brigantine *Santissima Trinidad* at *Havannah*, by *Narisco Sanchez y Serna*, now or late captain, master and commander of the said brigantine, at the monthly wages in the ac-

* Translation of the endorsement.

" For me, pay to the order of *Manuel Sagas de Canizares*, the above expressed sum, for value received of him.

" *Havannah, August 13th, 1788.*

" *Santiago Cupisono.*"

count

Canizares
Santissima
Trinidad. count hereunto annexed,* mentioned; to sail from the said port of *Havannah* to the port of *Philadelphia*; and that it was stipulated by and between the said captain and your libellant, that in case the owners of the said brigantine should think proper to discharge your libellant at the port of *Philadelphia*, in such case, your libellant should receive three months' wages, and be furnished with a passage back to the said port of *Havannah*.† That the said brigantine did accordingly sail from the port of *Havannah* and arrive at the port of *Philadelphia*.

* *The account annexed to the libel.*

The Brigantine Santissima Trinidad,
1788. To Manuel Sagas de Canizares, Dr.

Dec. 19.

To cash lent in Havannah to captain Narisco Sanchez y Serna, commander of the said brigantine, by Santiago Cupisono,	£.75 0 0
To 5 months and 19 days' wages, from July 1st to Dec. 19th, at 7 <i>l.</i> 10 <i>s.</i>	42 5 0
To three months' pay, agreeable to contract,	22 10 0
To his passage to Havannah,	22 10 0
	<hr/>
	162 5 0
Received in Havannah two months' advance,	15 0 0
	<hr/>
	147 5 0

To one month's boarding Mr. Canizares has been obliged to find,

5 12 6

† *Translation of the agreement.*

The commandant general of the navy, and the intendant general, &c. having both obliged me to take, as all other vessels do, a second pilot, as by order of his majesty, no vessel, small or great, can leave his dominions without having on board a first and second pilot. In consequence whereof, in the name of the owners, I have sought for *Don Manuel Sagas de Canizares*, second pilot of the navigation of Indies, and captain and first pilot in the French navy, as he has proved by his papers exhibited to the said intendant, in whose presence, treating of his wages, after having inquired of several other persons, found it more convenient and cheaper to pay him twenty dollars current money of America per month. And in case the owners think proper to suspend

Philadelphia, and your libellant continued on board the said brigantine during all the said voyage, and did his duty as a seaman and a pilot aforesaid, until the said vessel arrived at the port of *Philadelphia*, and your libellant was discharged from doing any more duty on board the said brigantine by the captain and owner thereof. And although your libellant hath requested the said captain and the said owner to pay him three months' wages, and to furnish him with a passage back to the *Havannah*, according to the agreement aforesaid, yet the said captain and owner have hitherto refused, and still do refuse, to do the same.

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"Wherefore, your libellant prays, that the process of this honourable court may issue against the said brigantine, and that she may be condemned by a sentence and decree of this honourable court, and that the said brigantine may be sold, and the money arising from

pend these commissions, they shall bring him back to this port of *Havannah*, paying him, above his wages, three months besides his passage, as the decency of his office requires it. And in all the ports where the said vessel shall go, he shall receive the half of the daily allowance of a first pilot, which is seven reals and $\frac{3}{16}$ current money, and for a second pilot four reals; or in case he does not receive provisions, &c. agreeably to the ordinances of *Bilboa* and the regulations of the navy; and in case this present agreement should not be complied with, he shall present it to the minister, that he may oblige them to pay what is hereby promised. Two to be written of the same tenor; one for the warranty of *Don Juan Joseph de Aguirre Perez*, to be signed in his name by the captain of his vessel, and another in the same manner to be left, as the original, in the naval office, with the commissary Mr. *Domingo Labadores*, each having the same strength, as if they had been made and executed before a notary public at *Havannah*.

July 1st, 1788.

Narisco Sanchez y Serna.

Manuel Sagas de Canizares.

Received in advance forty dollars.

Manuel Sagas de Canizares.

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Santissima
Trinidad.* from such sale may be applied to the payment of the said several sums due to your libellant. And your libellant shall ever pray, &c.

" December 19, 1788."

This libel states two separate claims of *Canizares*, the complainant, against the brigantine *Santissima Trinidad*. The *one* founded on an hypothecation of the said vessel, made by the then captain to *Santiago Cupisono* at *Havannah*, for 200 dollars advanced by the said *Cupisono* for necessaries for the said brigantine, as it is said, and to enable her to prosecute her voyage; which instrument of hypothecation is endorsed or assigned over by the lender to the present libellant: and the *other*, founded on a written contract between the said *Narisco Sanchez y Serna*, then captain, and *Canizares*, the libellant, made at *Havannah*, respecting the wages he should receive for serving as pilot and mariner on board the said brigantine, in her voyage from *Havannah* to *Philadelphia*. As these claims arise from different contracts, it is manifest that they must be separately considered.

To determine on the force of this instrument of bottomry, I shall first state the circumstances necessary to the formation of a genuine hypothecation, according to the maritime law; and then take a view of the history of this vessel's voyage, and her situation at the *Havannah*, when *Cupisono* advanced the money in question.

As to the first, I have had occasion, in three former suits in this court, to state the doctrine respecting a maritime hypothecation, and have not since found reason to alter my opinion of the principles on which these causes were decided. The cases to which I refer were, *Liebart, Baes, Durdeyn and Co.* against the ship *Emperor*, *Turnbull* against the ship *Enterprize*, and *Forbes* against the brig *Hannah*. The first and third of these

these causes were carried into the high court of errors and appeals, were there again solemnly argued and considered, and, without the intervention of any new testimony to alter the case, the sentences of the admiralty were confirmed on the same, or nearly the same, principles. I can only now repeat the substance of what was then observed.

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Trinidad.

[Here the judge recapitulated the doctrines advanced, and the authorities cited in the three foregoing causes, and then proceeded to say]

I shall now state the history of the voyage of this brigantine, as the same may be deduced from the testimony exhibited.*

It

* There was but one deposition produced in this cause, viz. that of the late captain of the brig. It might have been a question, whether his testimony was legally admissible or not, but he was not objected to as a witness by the proctors for either side. His deposition was in these words:

"*Mario Sanchez y Serna*, a witness produced on the part of the libellant in this cause, on his solemn oath on the holy Evangelists of Almighty God, saith—That he, this deponent, received the 200 dollars mentioned in the libel (he being then captain of the said brigantine at the *Havannah*) of *Cufisono*, by the hands of the libellant; which money, or any part thereof, he, the deponent, hath not paid to *Cufisono* again; and that he employed the said money in paying wages to the crew, and in furnishing fresh provisions, until he should receive money from the intendant. That a survey was ordered upon the vessel, and a report made to the intendant, and he then received a verbal order to take his vessel from the bay to the upper part of the harbour, where the king's warehouses are, there to discharge, and after that to transport his vessel to the king's arsenal, where she was repaired and had a new bottom. That he, the deponent, had no money, nor any person to whom he could apply to obtain the same. That the vessel leaked before he went into the *Havannah* to such a degree, as to make more than thirty inches of water in an hour. That he never knew Mr. *Cufisono*; but he had *had* three or four days' acquaintance with the libellant. That he requested the libellant to borrow him some money, and he took him to Mr. *Cufisono's*, where the money was paid to him. That

the

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It appears, that this vessel was chartered on account of the king of *Spain*, and was to sail from *Philadelphia* with a cargo of flour for *Carthagena*; that the flour was there to be sold, and a cargo of dye-wood purchased and brought back to *Philadelphia*, or some port of the *United States*. Such was the designated voyage. But, it seems, the captain, instead of returning to *Philadelphia* from *Carthagena*, went to *Jamaica* with an adventure of his own; to what amount does not

the paper marked A, exhibited in this cause and shewn to him, is a contract made between the libellant and the deponent. That at the house of *Cupisono*, the said *Cupisono* insisted upon the vessel and freight being hypothecated to him, otherwise he would not lend the money. That *Cupisono* knew that the vessel put in in distress—that every body knew it, and that he, the deponent, had told *Cupisono* of it.

" Being crossexamined, he saith, that the sailing orders (marked B) are the sailing orders he received. That the paper (marked C) is the charter-party signed between him and the freighter. That the paper (marked D) is the account delivered by the deponent, on his return, to his owners. Being asked how he came to apply to the intendant for money, he saith, That he presented a memorial to him for that purpose. Being asked whether he got any money in consequence of the memorial, he says, That he did not; but he was obliged to present five or six memorials. Being asked, how long after he arrived at the *Havannah* he presented a memorial, he answers, That he received the money from *Cupisono* the first Sunday after his arrival. Being asked on what day he arrived at the *Havannah*, he answers, That he does not remember whether it was on Thursday or Wednesday; that the memorial was presented to the intendant after the money was received from *Cupisono*. That in the conversation he had with *Cupisono*, he told him that he expected to receive money from the intendant, as he was chartered on account of the king. That he took on board a passenger at *St. Martha*, who was to proceed with him to this country. Being asked, whether, being at *Jamaica*, he did not dispose of an adventure of his own, he answered, he did, but they were not goods of the king's; that he invested the proceeds in dry goods, which he intended to dispose of at the *Havannah*. That he told *Cupisono* that he had contraband goods on board which he had brought from

not appear. That at *Jamaica* he purchased dry goods fit for the *Havannah* market, and then sailed with the brig to *Havannah*, where he disposed of the goods he had bought at *Jamaica*, on his own account. That at *Havannah* he borrowed 200 dollars of *Cupisono*, and executed the instrument called an hypothecation, to engage the vessel and her freight to *Cupisono* as security for this sum. That part of this money was expended in paying wages to the sailors, and part in supplying them with fresh provisions. That the vessel was refitted at the king's arsenal, and at the expense of the intendant. And that she afterwards sailed for and arrived at the port of *Philadelphia*.

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I agree with the counsel for the libellant, that the validity of an hypothecation ought not to depend upon the regularity of the captain's conduct with respect to his owners, previous to the time of her arrival in a foreign port, and of lending money for the relief of the ship's necessities; and will go farther, and say, that neither

from *Jamaica*. That in the course of conversations with *Cupisono* (for he had several) he does not recollect particulars. That *Cupisono* did not ask him the nature of his voyage. That *Cupisono* knew that the vessel was freighted with dye-wood on account of the king, and was designed for some port in the *United States*. That he had informed *Cupisono* that he had received money from the intendant; but that a little while before he sailed he met *Cupisono*, who asked him how he was off for money? to which the deponent replied, that he should be much straitened, whereupon the agreement (marked E, exhibited in this cause) was made and executed between them. That he was near two months and an half at the *Havannah*. Being asked, whether the paper (marked E) was given on the day it bears date, he answers, That it was not given on the day it bears date, nor does he recollect whether it was the day after, or three or four days after, but that the money was bona fide paid by *Cupisono* and received by the deponent, and that he does not recollect when the paper (marked E*) was executed."

* The hypothecation bond.

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neither ought it to be affected by the captain's subsequent conduct, provided the lender was in no ways privy to, or knowingly assistant in, his obliquities.

It has been urged on the other side, that the law of hypothecation was designed solely for the benefit of the owners, and an inference drawn, that if it can be shewn that the owners of a vessel have not been benefited, but injured, by the captain's conduct and consequent hypothecation, it ought not to be allowed. But this law has for its object the good of commerce in general. And no stranger would lend money on hypothecation, if his lien on the ship was to be invalidated by some future proof that the voyage was irregular, or that the captain had deviated from the orders of his owners and injured their interests, either before or after the hypothecation made.

But where shall we find, in the present case, that *necessity* which should justify the captain's conduct, and be the ground of a genuine hypothecation? This vessel was chartered by the king of Spain or his agent, the cargo on board was on the king's account, and she arrives in a leaky and disabled condition in one of his majesty's ports, where he had an officer stationed. This officer, the intendant, orders the brig to the public warehouse to be discharged, and then round to the king's arsenal to be repaired; all which was done at the king's expense. In truth, I cannot conceive a case of less necessity, or one wherein a more certain and able relief could be depended upon.

But, it is said, there were considerable delays before the intendant interfered, and that the captain was obliged to send in five or six memorials, and in the mean time the mariners were in great want of wages and fresh provisions, and that in this necessity the captain applied to *Cupisono* for 200 dollars, who refused to lend them unless the vessel should be hypothecated for his security. It appears, however, by the deposition,

tion, that the money was lent by *Cupisono* before the captain had made any application at all to the intendant, and therefore the neglect of the intendant could not have occasioned the necessity of borrowing money from *Cupisono*. That the captain of a vessel in the king's service, and in one of his majesty's ports, should not have credit for a few days' provisions, until the proper officer could be applied to, is too incredible to be seriously admitted. Still less can it be a sufficient ground for an hypothecation, that the mariners must have wages paid to them, in a place where it does not appear that any wages were due, nor is it probable that any could be due, because this was neither the conclusion of the voyage, nor even a port of delivery.

The money ought to have been lent solely on the faith of the hypothecation, and not on any personal credit; but here was a strong and well founded credit, for it is in testimony that *Cupisono* knew that this brig was chartered for the king's service, and it is expressly said, that the money was borrowed to pay wages and procure fresh provisions *until money could be had from the intendant*.

Further, in the quotation from *Mollov*, b. ii. c. 11. s. 11. it is said—"When a master is out of the country, and where he hath no owners, nor any goods of theirs, nor of his own," &c. Now it is confess that the captain had property of his own, and, as it should seem, to a considerable amount, since it was sufficient to induce him to violate his duty to his owners, in taking the brig, contrary to their orders,* on a trading voyage

* Translation of the sailing orders.

Philadelphia, 18th of October, 1787.

Don Narisco Sanchez,

Dear Sir,

You will observe the following orders: When you arrive at Carthagena, you will say that you carry 300 barrels of flour for the

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Canigres voyage to *Jamaica* for his own benefit; that at *Jamaica* he bought goods suitable for the *Havannah* market; and actually sold them at *Havannah*, though contraband—and that *Cupisono*, the lender, was privy to these circumstances. So that, instead of the lender's having the brig alone to look to for his security, he had two substantial personal credits to depend upon, viz. the intendant, from whom he might expect repayment of moneys advanced for the use of a vessel in the king's employ, and the captain, whose property he might have attached before he left the island, if satisfaction was not made. This circumstance alone, that is to say, *Cupisono*'s knowledge that the captain had property of his own on the spot, sufficient to answer the present exigencies of the vessel, would have invalidated the bond as a maritime hypothecation, inasmuch as it removes that *necessity* which the law requires.

There is a circumstance in the present case, which, although not in itself conclusive, forms too striking a feature in the transaction to pass unnoticed. A singularity

the king and troops. You will deliver my letter to *Don Manuel Garcia del Rio*, to whom it is directed. He will sell your venture and remit me the amount to pay your creditors. You must not stay long in these ports, and if you have the good luck to be despatched soon, you will come back with the cargo of dye-wood, which you will take at that port. If it is in *January* and the river is frozen, you will go to *New-York*, where you will deliver your cargo to *Don Sabrados de los Monterros*, and will write me by post. You will take a particular care of your people, and suffer no disorder.

The said *Don Garcia* will give you the cash you shall want for the provisions of the brig, desiring you to be very saving in all, but let nothing be wanted, and keep good order. In case you should not be despatched soon, you will present a memorial to the viceroy, conforming yourself to the charter-party.

May God grant you a good voyage.

Juan Joseph de Aguirre Perez.

larity peculiar in a maritime hypothecation is, that the law allows an extraordinary premium or interest to the lender, even to any extent, according to the risk to be run; because, if the ship should be lost, the money lent is lost with her. But here a stranger lends 200 dollars to a captain in distress, without even stipulating for common legal interest for the use of his money. I say, this alone might not be conclusive against the hypothecation, because a stranger may be as generous as he pleases; but, in connexion with the other circumstances, it gives room for suspicion that the engagement of the brig to *Cupisono* was not made within the rules and spirit of the maritime law.

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For the above reasons, I adjudge that the bill in this cause be dismissed, so far as the same hath respect to a claim of 200 dollars, said to have been lent on the credit of the brig *Santissima Trinidad*.

I am now to consider the libellant's demand of wages for serving as pilot and mariner on board this vessel from *Havannah* to *Philadelphia*.

The counsel for the libellant hath rested his claim of 87*l. 5s.* for wages, on a written contract made at the *Havannah*, between *Narisco Sanchez y Serna*, then captain, and *Canizares*.

But it has been contended, on the other side, that as this agreement is in writing, and bears a seal, and is not, according to the terms thereof, in the usual way of agreeing for mariners' wages, it becomes a special contract, and is not properly of admiralty jurisdiction.

Its being in writing, however, is no more than a testimony or memorandum of the agreement made, and does not affect the jurisdiction of this court. What is called a seal, appears to be nothing more than a printed stamp, for which a duty is paid to the crown: certainly, it is not the seal of the parties, or of either of them. But, as to the terms of the contract, these

are

Canizares are indeed out of the usual course, and deserve further consideration.

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One of the reasons for allowing mariners to sue in the admiralty for their wages is, that the debt arises from services performed, or to be performed, at sea; and a lien on the ship is given them for security, because the contract they make is supposed to be on the credit of the ship.

Now, although the wages of 20 dollars per month, promised in the present case, appear to be extravagant, yet as the difficulty of getting a person qualified to serve both as a skilful pilot and able mariner might have been great, I think the rate of wages per month ought to be allowed as contracted for. But I cannot, upon any principle, allow, that a captain hath a power to bind his owners and their vessel to the payment of a mariner's wages for three months after his discharge, and after all services at sea or elsewhere have ceased. If he could legally do this for three months, why not for six or for twelve months, or even saddle his owners with an annuity for life to a mariner, for a few weeks' actual service? How far the common law might consider this contract as binding on the captain personally, it is not my business to say; but, as judge of admiralty, I shall be far from doing my part towards establishing a precedent by which captains, in addition to the great power they necessarily have over the property of their employers, may have that of obliging them to the payment of unlimited sums for an unlimited time. The captain might have engaged for his owners, to pay wages per month during the service, or a specific sum for the run, to any amount justifiable by the circumstances and necessities of the case; but to bind the owner to periodical payments to a mariner, after a total discharge from the service, is what I believe no captain of a vessel ever before attempted. For, whether this was to be paid all at once, or at three several

several times, it matters not; the contract is for *three months' wages after discharge.*

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There is another claim under this contract for 60 dollars, to take the libellant back to the *Havannah*, on being discharged here.

The maritime custom is, that if a master or owner discharge a mariner in a foreign port, before the completion of the voyage for which he engaged, some reasonable allowance shall be made, over and above the wages due, to enable him to return to his own country, or to go to the port which, by the articles, should have completed the voyage. And this allowance is usually the amount of one month's wages. And it is a reasonable custom, where the mariner is willing to perform articles and finish the voyage, but the master or owner thinks fit to discharge him sooner, for their own convenience, and without just cause of complaint against the mariner. This part of the contract before us is, therefore, consistent with maritime custom, but certainly unreasonable as to the sum promised.

Whatever power a captain may have by law to bind his owners by contracts made abroad for the services of the ship, yet he cannot oblige them beyond what is usual and customary, without shewing that the unusual charge arose from the necessity of the case. The present charge is expressly made for conveying the libellant back to the *Havannah*. I have therefore inquired what is the usual charge for a passage from this port to the *Havannah*, and find that 40 dollars is an ample and generous allowance.

Fraud and collusion between the captain and *Canizares*, the libellant, have been suggested, but not proved. Yet, if I had not found that this cause might and ought to be determined on general principles, there are two circumstances in the case which would have induced a more strict inquiry into this captain's conduct. The one, which I have already noticed, is

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Cupisono's lending money on hypothecation, without securing or even asking for common interest; which, though a possible, is not a usual occurrence. The other, is a contract between the captain and *Canizares*, which concludes with these remarkable words—“*Each,*” (that is, the original and copy) “*having the same strength as if they had been executed before a notary public at Havannah.*” The question naturally occurs, and why was not this contract made and executed before a notary public at the *Havannah*? An honest captain, who is reduced to the necessity of binding his owners to hard and unusual terms, would at least take care that nothing should be wanting in point of form and public notoriety to justify his conduct. And, besides, I suspect that this contract, which bears a printed seal, or stamp, could not be legally executed, according to the regulations of the Spanish maritime laws and customs, but in the presence of a notary, or some public officer. But it was not necessary to clear up these appearances, as the cause may be decided on other grounds.

Upon the whole, I adjudge and decree, that *Canizares*, the libellant, have and receive from *Juan Joseph de Aguire Perez*, the respondent, the sum of 112 dollars and 60-90ths of a dollar, equal to *42L 5s. Pennsylvania currency*—that is to say—

For five months and nineteen days' wages,

from July 1st to December 19th, at	<i>L s. d.</i>
twenty dollars per month,	42 5 0
For his passage to the <i>Havannah</i> ,	15 0 0
	<hr/>
	57 5 0

From which deduct forty dollars paid in advance at *Havannah*,

There remains

15 0 0

<hr/>

With

With respect to the £l. 12s. 6d. added to the account, and charged for a month's boarding, I shall take no further notice of it than to observe, that it is neither mentioned in the libel, nor supported by any vouchers or testimony whatever.

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Finally, I adjudge, that the libellant pay one half, and that the respondent pay the other half, of the costs and charges of this suit.

Dean et al. v. John Angus.

Judgment on a plea to the Jurisdiction of the Admiralty.

1785.

In a former suit in this court, *Silas Talbot* libelled *Admiralty* and recovered against *Dean, Purviance* and *Har-* tion of a li-
beson, as owners of the brigantine *Hibernia*, and also bel by own-
against certain other persons, respondents in that their cap-
cause, for a wrongful capture on the high seas. From tisfaction of
the decree in that cause, an appeal was entered, and the damages
which they
the cause removed to the high court of errors and ap- have sustaine
peals for the commonwealth; where a judgment was ed in conse-
finally obtained against the said respondents to a con- quence of a
siderable amount. And now, *Dean, Purviance* and wrongful
Harbeson libel against *John Angus*, their captain, for capture
satisfaction of the damages they have sustained, in made by
consequence of the wrongful capture he had made. To him.
this libel, *Angus* hath filed for answer, a denial of the Owners are
wrong done, and a plea to the jurisdiction of this court answerable
in the present cause. "For this, viz. that the contract for torts
"between the said libellants and him, the said *Angus*, law, and not
"and also the damage alleged to be sustained by the under a
"said libellants, if any there be, arose upon the land, general prin-
ciple of the
maritime
by virtue of
any special
contract.

1785. "to wit, in *Philadelphia*, in the county of *Philadelphia*."

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John Angus. Three acknowledged principles of law naturally present themselves, for the solution of the present question, viz.

1st. Where the original cause of action is *exclusively* of admiralty or *exclusively* of common law jurisdiction, all incidental matters, and all matters necessarily flowing from, or dependent upon, that first cause of action, shall follow the original jurisdiction, whatever the complexion of those matters, separately considered, may be.

2dly. Where the original cause of action is partly of common law and partly of admiralty jurisdiction, the common law shall be preferred.

3dly. Where the jurisdictions are concurrent, the suit may be determined in either.

To one or other of these principles must the present case apply, to ascertain the jurisdiction by which it is to be tried; and the propriety of the application depends upon this sole question, what is the original cause of action in this suit?

It is alleged in support of the plea, that this is a new action between the owners of a vessel and their captains, and hath no necessary connexion with the suit brought by *Silas Talbot*. That it is enough if the respondents shew that the decree passed against the libellants, not as principals in the wrongful capture, but solely on account of the maritime law, which makes owners answerable for the misconduct of the captains they employ; and, therefore, their connexion with *Angus*, as captain of the brig *Hibernia*, must be considered as the true cause of the damages they say they have suffered, and the source from which the present suit originates. And so infer, that as this connexion is grounded on a contract, express or implied, made upon the land, the original cause of action must,

from

from its nature and locality, be exclusively of common law jurisdiction.

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John Angus.

The two criterions of exclusive jurisdiction are, the *subject matter* and the *locality* of the transaction.

It is not doubted but that the question of *prize or no prize*, when it is the foundation of a suit, is *exclusively* of admiralty cognizance, from the *subject matter*. The authorities to this point are too numerous and conclusive to admit of contradiction. But these authorities go farther, and say, that the mere taking as *prize*, and all matters dependent thereupon, are also peculiarly of admiralty jurisdiction. Lord chief justice *Lee's* opinion, in the case of *Rous v. Hassard*, as cited by lord *Mansfield*, and again cited by justice *Willes*, in the case of *Le Caux v. Eden, Douglas* 581, is full to this purpose. "The great question was, whether "an action of trespass would lie for taking a ship as "prize? Lord chief justice *Lee*, having called in two "civilians to his assistance, delivered the opinion of "the court, That though, for taking a ship on the seas, "trespass would lie at common law, yet, when it was "taken as *prize*, though taken wrongfully, though it "were acquitted, and though *there were no colour for* "the taking, the judge of the admiralty was judge of "the damages and costs, as well as of the principal "matter; and he laid it down as law, that if such an "action was brought in *England*, and the defendant "pleaded not guilty, the plaintiff could not recover."

By this quotation, it is clear, that, in order to fix the admiralty jurisdiction, it is not necessary that the question before the court should precisely be, Is this property lawful prize to the captor, or is it not? but a suit for costs and damages may be had in the admiralty for a taking as *prize*, though wrongfully done, and even without any colour for such taking; and, as it should seem from the case, even though the property so taken, should not be in the possession of the court.

So,

1785. So, also, in the case of *Linds v. Rodney and Vaughan, Douglas* 592, lord *Manfield*, in giving the opinion of the court, says—"A thing being done upon the high seas, does not exclude the jurisdiction of the common law. For seizing, stopping or taking a ship upon the high seas *not as prize*, an action will lie; but for taking *as prize*, no action will lie. The nature of the question excludes, not the locality." And a little farther on—"The end of a prize court is to suspend the property till condemnation, and to punish every sort of misbehaviour in the captors."

How it came to pass, that the case of *Silas Talbot* was, by the court of errors and appeals, and still is, by concession of counsel in the present cause, considered to be *not* of admiralty jurisdiction, on account of the subject matter, I am at a loss to conceive; especially when I look at the two only points of defence taken in that cause, viz. 1st. That from the papers found on board the captured vessel, and from other concomitant circumstances, there was a reasonable colour for taking *as original prize*; and, 2dly, That if the vessel captured was indeed prize to *Silas Talbot*, the three brigs were in sight at the time of the capture, and, by the maritime law, acquired thereby an interest in the property—I say, these pleas, together with the current of the testimony then exhibited, and the time of the transaction, being time of war, all united in fixing that cause within the admiralty jurisdiction, from the subject matter and nature of the case.

It is in obedience to strong conviction, that I thus venture to differ in opinion from the judgment of the honourable court of errors and appeals—a judgment which, I am inclined to believe, would not have taken place, but from the peculiar situation of *Talbot's* cause. The court of appeals for the *United States*, in prize causes, had rejected the appeal, because the question was not strictly *prize or no prize*, but an action for damages

damages between citizen and citizen. That court, as I have understood, looked at that cause in no other point of view, and therefore refused to take cognizance of it, and soon after adjourned. The appeal was then carried to the high court of errors and appeals for this commonwealth. The proctors had previously agreed not to contest the point of jurisdiction, and so the cause came before the judges on the merits only; and the court proceeded to sentence, without suspecting their jurisdiction. After sentence, however, some of the judges began to entertain scruples respecting the jurisdiction of the court, and, upon inquiry, found that the jurisdiction had only been submitted to by consent. The court well knew, that consent could not give jurisdiction, and therefore retracted or suspended the sentence, until an argument should be held on that point; and the question of the jurisdiction was again agitated. In the mean time, that is, between the rejection of the cause by the court of appeals for the *United States*, and its introduction into the court for the commonwealth, the case of *Le Caux v. Eden*, as reported by *Douglas*, with lord *Mansfield's* dissertation on admiralty jurisdiction subjoined, made their first appearance amongst us, and furnished new ideas respecting the court of admiralty. Then, for the first time, did the distinction occur, between the *prize* court and the *instance* court of admiralty. Possessed of this idea; the judges of appeal for the state, looked at the proceedings which the court of admiralty had adopted in the case before them, and found they had been *in personam*; by attachment, to answer for damages arising from a tort committed at sea. This, it was observed, was never the practice in the *prize* court, which always proceeded *in rem*, by proclamation and monition, whether the property be, in fact, in the possession of the court or not. And so it was in the case of *The King v. Broom, Carth.* 398., by proclamation

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at

1785. at the royal exchange, although the prize taken had been previously sold at *Barbadoes*. And, for this error of form in the admiralty, *Talbot's* case was considered as belonging to the *instance* court. The judges of appeal considered themselves as an *instance* court of appeals, and so proceeded to the definitive decree.

Had the court of admiralty, when *Talbot's* cause first made its appearance there, been possessed of the light which hath been since thrown upon this subject, it is more than probable that the process would have been conducted otherwise than it was. It should be observed, however, that an *exclusive* jurisdiction cannot be subverted by an erroneous process.

How far the consideration, that if the court of appeals for the commonwealth should reject *Talbot's* cause (as the court for the *United States* had done) the appellants would have had no other resource, and so been deprived of the benefit of an appeal, might have operated to induce the judges to take that cause within their cognizance as an *instance* court, I will not presume to say. But the peculiar circumstances of the case ought to be remembered; and I have mentioned them on this occasion, from a sense of the duty I owe to the jurisdiction entrusted to my care.

I come now to consider the origin of the cause before the court, and whether it is, or is not, necessarily dependent on, and consequential to, the case of *Silas Talbot*.

It has been said, that this suit is derived from three circumstances, viz. the contract by which *Angus* was made captain of the *Hibernia*—the wrongful taking at sea—and the damages the libellants have been obliged to pay, in consequence of this contract and wrongful taking. And it has been urged, that as two of these circumstances, viz. the contract and the payment of damages, happened on the land, the common law, by

the

the second general rule, hath the exclusive jurisdiction.

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John Angus.

It appears to me, however, that owners are answerable for torts done by the captains they employ, under a general principle of the maritime law, and not by virtue of any special contract. No such responsibility can be deduced from any articles or sailing orders given to captains of vessels. The contract may be the ground of an action of damages for a breach of orders respecting the particular interests of the owners; but, in cases of tort, the owners are answerable by a general law. The libellants have been obliged to pay the damages in *Talbot's* case, not because they employed *Angus*, but because they were owners of the brigs.

Neither can I consider the payment of moneys, according to the decree in favour of *Silas Talbot*, as the origin of the present suit. We should not stop short in the train of causes. In such a train, every circumstance is the effect of the preceding and the cause of the subsequent link. No decree would have past, no damages have been paid, nor would the present suit have been instituted, but for the original wrong done at sea. To this wrong, therefore, we must have recourse, for the source of the present action.

Some pains have been taken to apply the case of ransom-bills, charter-parties, and policies of insurance, all suable at common law, to the present suit. A ransom-bill supposes a divestiture of property by the rights of war, and the bill is a promissory note for a certain sum, in consideration of the victor's relinquishing his right of conquest, and restoring the property. In a suit, therefore, on a ransom-bill, the question of *prize or no prize* can only come in incidentally, to shew whether there was a value received or not. For, if the taking was wrongful, the property never divested, and, of course, the promissory bill was given without consideration. Charter-parties and policies of insurance,

1785. Dean et al. John Angus. ance, are written contracts, executed on land, respecting certain specific contingencies. It is altogether immaterial where these contingencies shall happen. The suit is founded in the binding force of the contract, and the contingencies are only incidental circumstances, shewing that the force of the contract is to take place and operate. But these are not parallel to the case before the court, wherein the libellants complain of damages they have sustained, in consequence of a tort committed at sea, by the captain they had employed.

When the case of *Silas Talbot* came first before this court, the libel was filed in the name of *Silas Talbot qui tam*, against the brigs *Achilles*, *Patty* and *Hibernia*, and against certain persons, in the said libel named, as owners and captains of the said brigs. All these persons (except two, if I rightly remember) appeared either in person or by proxy, and entered into stipulations, according to the practice of the court. In this form the suit proceeded through the admiralty and through the court of appeals. The question was general in both courts, viz. Whether there had been a wrong done? and if so, whether the parties who had appeared as respondents to the libel, were answerable for the damage, and to what amount? And, finally, the decree was also general, that the appellants should pay to the appellee certain moneys, in recompense of the injury sustained. But how far any particular captain, or the owners of any particular vessel, might have justified themselves by a separate defence, was never the subject of inquiry—no such specific justification having been proffered in either court. And whether it is or is not now too late to make discrimination, may be the subject of future discussion: but I mention this to shew, that the present libel manifestly rises out of *Talbot's* case, and that its pursuit will unavoidably force us up to

to the wrongful taking *as prize*, for the origin of the present suit.

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Since, then, I cannot but consider the case of *Silas John Angus Talbot* as properly belonging to the *prize court* of admiralty, and that the present suit originates from, and is a supplementary part of, that transaction; I cannot (according to the first principle stated) but overrule the present plea to the jurisdiction of this court.

I conclude with this observation, that in all pleas of this kind, where the law is doubtful, the leaning of the court will be in favour of its own jurisdiction. Not from a desire of extending the admiralty cognizance, but for this important consideration, that if the decision in favour of the jurisdiction should be erroneous, the doors of the common law are open for redress; and a prohibition may be obtained; but there is no remedy for the erroneous exclusion of parties who apply for the process of the admiralty, the benefit of the laws by which it is governed, and the summary justice it affords.

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Dean et al. v. John Angus.

Judgment on the Merits.

1785.

Under what circumstances owners of vessels ought to recover against the captains they employ for damages suffered in consequence of their misconduct. Captains are not answerable for losses arising from unavoidable accidents, mere errors of judgment, or failure of success, after having exercised all reasonable diligence and discretion.

THE bill filed in this cause states, that *John Angus*, being commander of the brig *Hibernia*, belonging to *Joseph Dean* and others, did, on a certain day, without any licence, order, or authority from his owners, and without any probable cause of capture, with a view to his own private interest and emolument, combine and confederate with certain malefactors, and did pursue and take the brigantine *Betsey*, then in the possession of *Silas Talbot*, commander of the sloop *Argo*, as lawful prize and booty of war. And that the said *John Angus*, not being ignorant of the premises aforesaid, but well knowing the same, and intending to deprive the said *Silas Talbot* of his prize, and to defraud and injure, as much as in him lay, his owners, the libellants in this cause, did cause the brigantine *Betsey* to be sent to places unknown, &c. whereby she was lost, &c. The bill then goes on to state, that, for this cause, the said *Silas Talbot* did afterwards file his bill in this court against the said *John Angus*, and against his owners, the present libellants, and also against certain other persons, in the said bill named, for the wrong and injury done, and did, by the sentence and decree of this court, recover against them the sum of 12,700*l.* 5*s.* damages, with costs of suit. Whereupon, an appeal was entered to the honourable the high court of errors and appeals of this commonwealth, in the prosecution and final issue whereof the said *Silas Talbot* did recover against the appellants the sum of 11,141*l.* 5*s.* 4*d.* of which sum the libellants in this cause were compelled, and did actually pay the sum of 4000*l.*; and, also, that they had expended the further sum of 450*l.* in defending themselves

themselves against the bill of the said *Silas Talbot*, and in prosecuting their said appeal. Whereupon, they now ^{1785.} _{Dean et al.} pray judgment against the said *John Angus*, for repara- ^{v.} _{John Angus.} tion of the damage and loss they have so sustained.

I have found it necessary to the determination of the present question, to consider it under the three following points of view, viz.

1st. How far the cause, now before the court, may be considered as connected with, or determined by, the decree in the case of *Silas Talbot*.

2d. Under what circumstances, owners of vessels ought to recover against the captains they employ, for damages suffered in consequence of their misconduct. And,

3d. The specific circumstances of the present case, as they stand on the testimony; or, what is called the merits of the cause.

As to the first point, I can see no connexion between this cause and the case of *Silas Talbot*, further than this, that as it originates from the same transaction, to wit, a *taking a prize on the high seas*, the jurisdiction is thereby determined. In all other respects, the two causes proceed on different principles. The points in view in *Talbot's* case were, how far owners of vessels were answerable for torts committed by the captains they employ; and whether the taking in question was, in fact, such a tort, as they ought to be answerable for. The objects in the present case are, under what circumstances, owners may recover against their captains; and whether *Angus* was or was not *particeps criminis*, with the wrong doers in *Talbot's* case. The complexion of the two causes being thus manifestly different, it cannot, with any reason, be admitted, that the testimony or decree founded thereupon, in the former, should be conclusive in the present case. The decree in *Talbot's* case was against certain persons who, by stipulation, had made themselves responsible for the issue of that suit.

1785. suit. It is not inconsistent with the record of that decree, for captain *Angus*, who was not one of those stipulants, and who was no party to that suit, to come in now, and make his specific defence, when personally called upon to answer, and shew that he was not one of the wrong-doers *against whom* that decree was obtained.

On the second point, viz. Under what circumstances owners of vessels ought to recover against the captains they employ, for damages suffered in consequence of their misconduct. It is consonant with reason and authority, that captains are not answerable for losses arising from unavoidable accidents, mere errors of judgment, or failure of success after having exercised all reasonable diligence and discretion. It would be very difficult, and is at present unnecessary, to delineate the particular circumstances, and kinds of misconduct, which should render a captain responsible to his owners. Every case that occurs, must be judged of by its own peculiar circumstances. The present libel states, "That *John Angus* did, without any authority from his owners, combine with certain malefactors, and, without probable cause of capture, take the brig *Betsey*, then in the possession of *Silas Talbot*, as prize and booty of war. And that he did this, not ignorantly, but well knowing the circumstances, and with a view to injure the said *Silas Talbot*, and also his owners, as much as in him lay." If these charges are supported by the testimony now before the court, there can be no doubt but that he ought to be answerable to his owners for whatever they have suffered in consequence of this transaction.

And this leads to the third point, viz. The consideration of the specific circumstances of the case, as exhibited by the testimony; or, the merits of the cause.

The facts, so far as they respect captain *Angus*, appear to be in substance as follows:

Angus

Angus sailed on a trading voyage to *Teneriffe*, in the 1785. Dean et al
John Angus armed letter of marque brig *Hibernia*, in company with the brigs *Patty* and *Achilles*, also letters of marque, and bound to some ports in *Europe*, under the commands of captains *Prole* and *Thomson*. *Angus* had received written instructions from his owners (the present libellants) to keep company with the two brigs so long as he should think it prudent, and had their approbation to cruise with them on the coast for two or three weeks, if they should so agree. At *Reedy Island*, in the *Delaware*, a consultation was had between the three captains, and *Prole* was appointed commodore. Two or three days after they had got out to sea, they discovered a brig and a sloop at a distance. *Prole* gave orders to chase, which was done. *Prole* and *Thomson*, under British colours, came up with and took the brig; but the *Hibernia*, being a dull sailer, was left four or five miles astern. When she came up, however, captain *Angus* inquired what the captured vessel was, and was informed by *Prole* or *Thomson*, that she was a good prize, bound from *Montserrat* to *New-York*. To which *Angus* replied, that if the brig was prize, the sloop (then in sight) must be so too, and asked why one of their fast sailing brigs did not pursue her. To which it was answered, that they did not choose to leave the prize till they saw her well manned, and ordered him to chase the sloop; which he accordingly did for two or three leagues; but finding he could not come up with her, he hauled his wind, and beat up again for the other brigs; but did not reach them till just before dark. *Prole* then sent a boat to *Angus*, demanding two of his hands to help man the prize, forwarding, at the same time, a paper for *Angus* to sign; which appears to have been orders drawn up by *Prole*, and signed by him and *Thomson*, for the prizemaster they had put on board the captured brig. *Angus* hastily signed this paper on the binnacle, and sent the two men required. The wind then

1785. blowing very fresh, the sea running high, and the night

Dean et al. coming on, the four brigs separated, and saw each other
John Angus. no more.

From this detail it is manifest, that *Angus* had no opportunity of acquiring information of those circumstances which were the ground of condemnation against the respondents in the suit of *Silas Talbot*. The assurance of *Prole*, the commodore, that the *Betsey* was good prize, was, in the then situation of affairs, sufficient to convince *Angus* that there must have been, at least, probable cause of capture; and if the enterprize had been a successful one, which he had no substantial reason to doubt, *Angus* would not have been justifiable in neglecting any thing, on his part, to secure to his owners a share of the booty taken, or to add thereto by endeavouring to take the sloop also.

The only circumstance which hath a direct tendency to criminate captain *Angus*, is his signing the orders to the prizemaster put on board the *Betsey*, directing him to "keep to the southward, for fear of falling in with "the *Argo*." There are two ways in which this may, very naturally, be accounted for; neither of which are in the least contradicted by the testimony, viz. that in the hurry of the transaction, the boat waiting alongside, the sea rough, and night coming on, he signed these orders without reading them, having confidence in those who had drawn them up and signed before him; or, that, according to his first conclusion, if the brig was prize, the sloop must be so too, he still conceived the *Argo* to be an enemy, and therefore to be avoided by the prizemaster.

But, without having recourse to surmises, I am clearly of opinion, that the libel is not supported by the testimony; that is, there is not sufficient proof, that the respondent "did wilfully and knowingly, and without "probable cause of capture, join with others in taking "from *Silas Talbot* his prize and booty of war."

It

1785.

It is manifest, indeed, from the records of the court of appeals, that the libellants have suffered considerable damage, in consequence of this transaction at sea. But, ^{Dean et al.} John ^{V.} Angus as they had embarked themselves in a suit with real wrong-doers, and suffered judgment to go against them on general principles, without attempting a separate defence, this is no reason why *Angus* should not now bring forward that specific testimony, with regard to his own conduct, as may exculpate him from the charges laid in the present libel.

Some stress has been laid on a passage in the deposition of W—— D——, exhibited in *Talbot's* cause, tending to prove that *Angus* was not so ignorant of the circumstances respecting the *Betsey* and *Argo*, as he pretends. The passage is in these words—“ After-
“ wards captains *Prole*, *Angus* and *Thomson*, in the
“ presence of this deponent, consulted what they should
“ do with the brig *Betsey*, and being of opinion,” &c.
Whatever weight this deposition might have had in *Talbot's* suit, it is inadmissible in the present; but I would observe, that this circumstance is not supported by any other testimony on the records of this court; on the contrary, from the general history of the transaction, there seems to have been no period of time in which *Angus* could have left his vessel, or the other captains have been on board the *Hibernia*, to hold this consultation. D—— must, therefore, have been mistaken. Indeed, this is not the only circumstance in which he is singular. For, just before, he says—“ The brigs *Achilles* and *Hibernia* endeavoured to speak her (meaning “ the *Argo*) but could not come up with her. And upon the said *Church's* saying, that captain *Talbot* was “ not a man that would run away from one of them, “ if they would not both chase, the brig *Achilles* then “ chased alone,” &c.

Now, the whole current of testimony agrees in this, that it was the *Hibernia*, and not the *Achilles*, that chased

1785. chased the *Argo*. And, as I remember, in some stages
of *Talbot's* suit, it was urged as a circumstance of ag-
gravation against the owners of the *Hibernia*, that their
captain was employed in driving off the *Argo*, whilst
his confederates were plundering her prize.
John Angus.

These observations on D——'s deposition do not directly affect the present question; but I mention them because, if I could find any substantial ground to believe that *Angus* was indeed *particeps criminis* with *Prole* and *Thomson*, or that he knew, or had any opportunity of knowing, the circumstances which should have prohibited them from making that unfortunate capture, I should not be so clear, as I now am, in adjudging,

That the bill in this cause be dismissed, and that the libellants pay the costs of suit.

Whereupon the libellants appealed; and, after long argument, the court adjudged, in June 1785, that *John Angus* should pay to the libellants 94*8*l.** 15*s.* 10*d.* with interest thereon from the twenty-second day of January 1785.

Falliage

Falliage et al. v. Schooner Hope.

1779.

MOLLINEAUX, and others, Frenchmen, were owners of the schooner *Hope*, which was captured by a British privateer in her voyage from *Maryland* to *France*. *Falliage*, and others, the former crew, but now prisoners on board, contrived to make the British prizemaster and his companions very drunk, and to keep them so till the vessel was brought into the port of *Philadelphia*. And now the owners claim their vessel again, on paying salvage, agreeably to the marine laws of *America*.

But it was urged, that they, being French subjects, ought to be determined by the law of *France*, which gives the whole of recaptured vessels to the recaptor, when the prize has been more than twenty four hours in the possession of the enemy.

But the judge was of opinion, that as American owners were, in cases of recapture, allowed the benefit of the American law in the admiralty courts of *France*, French owners ought also to have the benefit of the American law in the ports of the *United States*.

Verdict, that the schooner be restored to her former owners, they paying to the recaptors one half of the value in lieu of salvage.

Ducatur v. The Schooner Desire.

THE question was whether French owners should have the benefit of the ordinance of congress relative to recaptures, and it was so determined.

French owners are entitled to the benefit of the ordinance of congress relative to recaptures.

Rice v. Taylor.

1779.

If at the time of a prize taken by a vessel of war, another armed vessel be in sight and in a possible condition to join in the battle, she will be allowed a share of the prize in proportion to her men and guns, but not if it be manifestly impossible for her to take any part in the battle.

THE parties were commanders of privateers duly commissioned. *Taylor* engaged, and took a prize, *Rice* being in sight at the time of the capture. Whereupon *Rice* claimed a share of booty under the maritime law.

On the trial it appeared, that although *Rice* was in sight at the time of the action, yet from the peculiarity of his situation, it was impossible he should have contributed to the capture by terrifying the enemy: and so the jury found a special verdict in these words:

"That captain John *Rice* was in sight, and at the distance of five or six miles at the time of the said capture, mentioned, and so forth; but that he did not contribute to the said capture, or influence her surrender to the said captain *Taylor*. And if upon this finding, &c. &c."

The fact was, that *Rice* lay within a bar, close upon the shore of *New-Jersey*, and saw *Taylor* engage a British vessel about five or six miles out at sea. There were also two British vessels of force between *Rice* and *Taylor*, at the time of the action. *Rice*, observing the battle, saw at last one of the vessels strike to the other, but could not clearly discern which had the victory: believing that *Taylor* had surrendered, he reported in *Jersey* that poor *Taylor* was taken at last. But he found a few days afterwards, that *Taylor* had been successful, and brought his prize safe into port. Whereupon he claimed a share of the booty under the general law respecting vessels in sight of a capture.

In the argument on the special verdict, the counsel for *Rice* rested his claim principally on *Mollov*, b. 1. c. 2. s. 20, urging that no testimony should be admitted against a presumption of law.

But

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Rice

v.

Taylor.

But the judge observed, that the presumption of law is founded on a material fact: to wit, that the vessel in sight be armed and *prepared for battle*, or at least in a possible condition to join in the battle. When this is the case, the law will presume that her presence terrified the enemy and influenced the surrender; and therefore, although she does not join in the engagement, allows her a share of the prize in proportion to her men and guns. But if a vessel in sight is aground on a shoal or bar, or is far to leeward, with disabled masts and rigging, or is so situated (as in the present case) that it is manifestly impossible for her to take any part in the battle, she cannot be considered as to be so *prepared for battle* as to bring her within the presumption of law.

"When the reason of the law ceases, the law itself "ought likewise to cease with it." 1 *Black.* p. 61.

And so *Rice's* claim was dismissed.

There was an appeal from this decision, but the appeal was not prosecuted.

Montgomery

*Montgomery v. Wharton and others, owners of the ship
General Greene.*

1780.

Owners of a vessel which they have chartered to others, may dismiss the master they have appointed before the completion of the voyage, (although he has signed bills of lading for the cargo, and shipped his mariners,) without the owners shewing sufficient cause for such dismission.

WHARTON, and others, owners of the ship *General Greene*, had chartered her to certain merchants for a particular voyage, and appointed *Montgomery* master for that voyage. The ship had cleared out at the naval office, and was on the point of sailing, when a sudden frost filled the *Delaware* with ice, and fixed her in the port of *Philadelphia*. During the winter some differences arose between the owners and master: The consequence of which was, that the owners, by a letter of dismission, discharged *Montgomery* from their service, and put another master on board. Whereupon *Montgomery* libelled against the owners in the admiralty to compel them to fulfil their contract with him.

In cases of real injury the master must apply to the laws of his country for redress.

The question was, whether owners could dismiss the master they had appointed before the completion of the voyage, after he had signed bills of lading for the cargo, and shipped his mariners, without the owners shewing sufficient cause for such dismission.

And it was contended, that the master, from the time of his appointment, has the sole command of the ship vested in him, and cannot be displaced without committing some offence sufficient to forfeit his rights and justify a dismission. That after signing bills of lading, he becomes answerable to the freighters for the delivery of the cargo, and that the owners cannot by their act exonerate him from this charge, whilst the bills of lading signed with his hand, remain in the possession of the freighters: that the libellant, considering himself as engaged for this voyage, had neglected to seek for any other appointment; and that the owners discharging him at this time, was an injury which

which the court ought in justice to redress by compelling them to reinstate him in his office.

1780.

Montgomeryv.
Wharton
et al.

In behalf of the respondents it was urged, that the owners of a ship have, and ought to have, a right to remove the master at pleasure; because their interests are so deeply concerned in the appointment, that they are answerable not only for his imprudent conduct, but are bound by contracts he may legally make on account of the concern: that if, after their choice of a master, his appointment should be deemed irrevocable for the voyage, unless some gross offence can be proved, the owners will be at the mercy of the master, who, by his weak or wicked conduct, may bring them to ruin. That if when the owners have dismissed the master, the court should undertake to reinstate him, contrary to their judgment and inclination, and so force him upon them, the court and not the owners, ought to be answerable to the freighters for any consequences that may ensue: that neither the charter-party, shipping articles, or bills of lading, prohibit a change of the master, as the contracts made with him are made in his official and not in his personal capacity: that the master is in fact the representative of the owners, and not himself personally bound, neither is he answerable for the conduct of his successor: that in case an action should be brought against him for a breach of contract on the bills of lading, he might plead his dismission by the owners, and it would be good in law: that the subordinate officers are appointed by the master of a ship, and if they should misbehave, or prove insufficient or unsafe, the owners have no remedy but by the removal of the master: that if owners are bound by the appointment of a master to continue him for the voyage, the master ought also to be bound to perform the voyage, even against his interest or inclination; but if, in case of the master's refusal, the owners should libel against him in the admiralty, the court could

1780. **Montgomery v.
Wharton et al.** could give no redress, because the court cannot award damages, neither can it compel the master to a specific performance of his contract, from the nature of the service: that the master's appointment is, and ought to be during pleasure only: that the same power which appoints can remove: that if a master suffers injury by an unreasonable dismission, he may have his remedy at common law, where ample recompense in damages will be made to him: and finally, that whatever inconveniences may arise to masters being subjected to the caprice of owners of vessels, much greater would arise to the owners, should they be compelled to retain in their service masters once appointed, however contrary to their judgment or interest; and that no instance can be produced of a master being thus forced upon the owners of a ship by any court whatever.

To which, counsel for the libellant replied: That this cause came properly before the court of admiralty: that where a court hath the right to take cognizance of an injury, it follows necessarily that it can give redress: that if the court cannot award damages, it can order a specific performance of the contract: that the court can compel the master to such performance; and if he refuses, can attach his person, and oblige him to give security for the completion of his contract; and, therefore, the jurisdiction is competent: that it would be unjust to send the master to common law for redress, on the owner's breach of contract, as the owners may fail and be unable to pay damages, and therefore the ship ought to be his certain and proper security: that all contracts ought to be sacred and mutual, being founded on reciprocity; and it would be absurd to allege, that the master is bound on his part, and the owners not bound on theirs: that a master engaged for a voyage, is like a servant indented for a certain time; and that the engagement or indenture cannot be dissolved, during the terms, but by mutual consent: that this

this vessel was chartered to the freighter, who acquired by the charter-party a temporary property in her, and the owners had nothing to do with her for the time, the ship being under the same circumstances with a house leased for a term: that after the charter-party is signed, and the goods laden on board, the owners cannot discharge the master at their pleasure; as his good character and abilities might have been the inducement which led the freighter to make choice of that ship in preference: and, lastly, that if no instance can be found of a master's being forced upon the owners of a ship, neither can any authority be produced, giving the owners the arbitrary power of dismissing the master at pleasure, and without assigning sufficient cause.

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v.
Wharton
et al.

After having carefully considered the arguments advanced, and the authorities cited in this cause, it appears to me unnecessary to pursue the whole tract of argument that hath been taken on this occasion. The decision of the cause rests solely on the nature of the contract between the owners of a ship and the captain they employ. And the terms or substance of such a contract is, in my opinion this, viz. If the master well and faithfully performs the duties of his station, the owners, on their part, are bound to pay the stipulated wages, and allow him all the customary privileges of his office. But it does not seem to be any part of the contract, that a master once engaged, shall be master for the voyage at all events. This might be extremely injurious to owners, on account of the very extensive powers a master hath over their property. And however hard it may appear that the master should be subject to the caprice of his owners in this respect, he must consider it as one of the unavoidable inconveniences of his occupation, and in cases of real injury apply to the laws of his country for redress. Much greater would the danger be to owners

of

1780. of vessels, and indeed to commerce in general, if the appointment of a master should be irrevocable for the voyage. Whatever good opinion an owner may have of the master, at the time of his appointment, he may find sufficient reason afterwards to change his mind, and yet not be able to produce legal proof of his defection or inability. Fidelity or infidelity before a service performed, is a matter of opinion only, and it would be an unreasonable hardship to compel an owner to continue what was originally a voluntary trust, in the hands of a person of whom he may have found subsequent reasons to believe that he may prove either unfaithful or unskilful, although he may not be able to charge him with any positive offence: but I cannot see how this court can interfere to any effect. If the court should decree that the owners shall receive the libellant on board, as master for the voyage contracted for; have not the owners a power to sell their ship, to lay her up, or totally change the voyage, and so evade the decree? Or, if a master should refuse to go the voyage for which he engaged, can this court compel a specific performance of the duties of his office? The remedy in both cases must be in damages for a breach of contract, to which the common law is most competent. Let the bill be dismissed.

The libellant appealed from this judgment, and the cause was again fully argued before the judges of the high court of errors and appeals; but the libel was finally dismissed.

Job

Job Pray et al. v. Brig Recovery.

1780.

JOB Pray and Aaron Stockholm engaged and took as prize, the brig *Recovery*, a vessel belonging to the enemy; the schooner *Livingston*, a vessel belonging to *Robert Morris*, the claimant, being in sight at the time of the capture. *Pray* and *Stockholm* were duly commissioned by congress to cruize as privateers against the enemy; but *Kelly*, the master of the *Livingston*, had no such commission.

The counsel for the claimant urged, that it was a principle of law—that *prizes taken by vessels not commissioned, inured to the sovereign power*, and exhibited a transfer from congress, of all their title to any share in this prize to *Robert Morris*; empowering him to prosecute a claim, in the name of the *United States*, but for his own benefit. And the authorities cited in support of this doctrine, were *Carthew* 474. and *12 Modern* 134.

But neither of these authorities apply strictly to the present case. In the one, the prize was a wreck, stranded on the shore, and great part of the booty was taken on shore by the crews of vessels not commissioned: in the other, a vessel without a commission, took a prize, and carried her into a foreign port, where the captor sold her, and converted the money to his own use.

In both cases, the booty was taken by persons not commissioned to take; no vessels duly commissioned assisting in, or being present at the time of the capture. But in the present case, the prize was in fact taken by vessels regularly authorized for the purpose, and the noncommissioned vessel only in sight at the time of the battle. In the cases cited, no persons were present or assisting to whom the booty could be legally adjudged. Here the libellants, the real captors, were

3 D duly

1780. *duly commissioned to take, and empowered by their
commissions, and the resolves of congress, to possess
and enjoy the property so legally taken.*

Pray
Brig Reco-
very. A vessel not commissioned must be considered as a mere merchantman; and according to *Lee*, 237, if a merchant vessel meets an enemy in the course of the voyage, and takes her, the prize shall belong to the captor: but if she goes out of her course to seek plunder, she may be deemed a pirate. Now, it is not pretended that the *Livingston* took the prize in question; on the contrary, it is in testimony, that she was running away whilst the libellants were engaged with the enemy; and now claims a share of the prize, as having been in sight at the time of the capture.

The right under which a vessel in sight may claim a share of a prize taken, is founded in a presumption of law, which supposes a vessel so in sight, and armed, and prepared for battle, to have induced a surrender. A presumption of law is a legal indulgence, and ought to be strictly confined within the reason of the presumption. But no authority has been adduced to shew that this indulgence has been extended to a vessel not commissioned to take, unarmed, and flying from the scene of action.

The *Livingston* cannot claim under the presumption of law, not being within the description; nor the *United States* under the general doctrine; because the prize was in fact taken by vessels duly authorised to take, which the *Livingston* was not. I adjudge, therefore, that the claim in this cause be dismissed, and that the brig *Recovery* be condemned as prize to the libellants.

Patrick

Patrick Mahoon et al. v. The Brig Gloucester.

1780.

THE brig *Glocester* had been captured by *Roger Kean* in the privateer *Holker*, and condemned as prize to the captors. The marshal being about to make distribution of the booty amongst the crew, according to the list handed in by captain *Kean*, was notified to stay in his hands twenty-five shares of the said prize, claimed by *Patrick Mahoon*, and others, as being a part of the crew belonging to, and concerned in the said privateer *Holker*. Notwithstanding that their names were not to be found in the captain's return; the libel, now before the court, is for these twenty-five shares.

The circumstances of this case appear, by the testimony exhibited, to be as follows.

The printed articles of the privateer *Holker* were set up at a common house of rendezvous for the enlistment of privateer's men, according to custom. The libellants, in common with many others, signed these articles, and made the necessary preparations for the cruize. When the *Holker* was ready to sail, the libellants, with the rest of the crew, repaired on board by order of the captain, and the vessel set sail. When they arrived at *Chester* on the *Delaware* (fifteen miles below *Philadelphia*) captain *Kean* mustered his crew upon deck, called over their names as subscribed to the articles, and then, without giving any reason for his conduct, selected *Patrick Mahoon* and twenty-four others, and ordered them on shore; refusing to let them proceed on the cruize, and when they earnestly solicited to be continued on board he forcibly drove them away, and the captain proceeded on his voyage, leaving the libellants behind.

A few

1780. A few days after *Kean* again called his crew together and produced to them another printed copy of articles, which he urged them to sign. Some objected, observing that they had already signed, and did not understand signing two sets of articles for the same cruize; but the captain enforced them with threats and even blows, to sign the new articles; declaring at the same time, that his view was to exclude those men whom he had left behind from having any share of the prizes they might take. The brig *Glocester* was captured during this cruize.

Mahoon
F.
Brig Glocester.

The respondents have rested their cause principally on a plea to the jurisdiction of this court; alleging that the injury, if any, was exclusively of common law cognizance; because the libellants' claim was founded in articles executed on shore, within the body of a county: that although the admiralty could determine the question of prize or no prize; yet it could not determine to whose use, having no jurisdiction in disputes between owner and owner, owner and captain, or captain and mariner, except only in the case of a mariner's wages, which is allowed out of special favour, and not of right, further than as *communis error facit jus*.

The facts being fully ascertained, and not controverted, no difficulty arises from that quarter. It is in proof that captain *Kean* forced the libellants on shore after the voyage was begun, and compelled the remainder of the crew to sign the new articles, with a view to exclude the libellants from any advantage they might claim under the former; and it is contended that this court cannot redress the injury, because the suit respects *damages*, which the common law alone can ascertain. The truth, however, is, that the parties do not sue for redress of an injury; but for their shares of a prize legally condemned to the use of the owners, officers, and crew, and of all persons belonging to, or concerned

concerned in the privateer Holker: of which crew, they say, they are a part. The articles of enlistment, executed on shore, is no bar to the jurisdiction of the admiralty. Mariners are generally engaged on shore, and always sue for their wages in this court. In the one case the mariners are paid by monthly wages, or by the run, in the other by a share of the booty taken. There is the same reason in both cases. But I am of opinion that the articles are not the true foundation of a seaman's claim. If one or more mariners should enter on board a vessel, with the knowledge and consent of the master, should receive his orders and perform the duties of the station, they would be entitled to customary wages, or a proportion of the booty taken in common with the rest of the crew, although they had signed no articles at all: the right is not founded in the articles, but in the service.

1780.
Mahoon
v.
Brig Gloes-
ter.

It has been said, that this court can only determine the question *prize or no prize*, but cannot adjudge *to whose use*. *Broom's* case in *Carth.* 399. and 475, is express in point to the contrary. The admiralty not only decreed *lawful prize*, but also to whose use, viz. *to the king's*; and *Broom* having converted the property to his own use, was sued in the admiralty by the king's proctor for the value. *Broom* applied for a prohibition, which was denied; because the court of admiralty, having determined the property to be prize *to the king*, this second suit was deemed to be only a continuation of the original process.

Moreover, it cannot be supposed but that during the many maritime wars in which *England* hath been engaged, contests about the rights of seamen to shares of prizes must have frequently occurred. If then such claims were only triable at common law, they would doubtless appear in some of the books of reports. But no actions of this kind can be found in those books, nor even prohibitions prayed for in such cases. The inference

1780. inference is, that such suits were allowed to be exclusively of admiralty jurisdiction.
Mahoon

Brig Gloster. If captain *Kean* had any reasonable objections against the libellants, he should have made those objections before he received them on board, or at least before the vessel had weighed anchor and commenced her voyage.

As the libellants were in fact forced from the service, I do not see why this wrong, on the part of the captain, should deprive them of the right they had obtained in this cruize by the enlistment, and by the captain's confirmation of that enlistment when he received them into his service.

I adjudge that the libellants have and receive their respective shares of the prize brig *Glocester*, and her cargo, in common with the rest of the *Holker's* crew.

N. B. The respondents appealed from this decree; but the court of appeals confirmed the sentence.

Keane

The following appeal from the above decision is taken from
2 Dall. 37.

*Keane et al. Libellants and Appellants, v. The Brig
Glocester et al. Appellees.*

1782.

THIS was an appeal from the admiralty of *Pennsylvania*, and after argument, *Paca* and *Griffin*, the presiding commissioners, delivered the following sentence.

By the Court:—Two objections are made to the decree below:

The first objection is, that a libel does not lie by the crew of a privateer, for their respective proportions of a prize.

The second objection is, that the libellants, in this case, are not part of the privateer's crew, nor captors, entitled to a proportion of the prize stated in their libel.

With regard to the first objection, we are of opinion, that a libel does lie, and that it is the proper and regular mode of redress: for, the commission of a privateer, according to the form established by congress, extends not only to the captain, but also to the ship and crew; they are captors, as well as the captain, and their rights to the thing captured, is equally founded on the commission. The ship is figuratively considered as an agent, and represents the owners. Articles of agreement generally direct the distribution; but if no articles are executed, the admiralty courts will make distribution, in proportion to the number, interest and merits of the captors.

But, it is said, “the admiralty court, in this case, “had exercised all its jurisdiction and power; that a “libel was filed by the captain, and a decree passed “for condemnation; that the prize has been sold, and “the money lodged in the hands of the marshal; that “the marshal must make distribution according to the “list

1782. "list of the crew, which the captain shall deliver; and Keane et al. "if the captain makes a false list, the party injured
Brig Gloe-^{v.} ter. "has no other remedy than by an action at law."

The original libel, we find, was filed by the captain, in behalf of himself and crew, and the decree adjudges the prize to the captors. The marshal has sold the prize, and the money lies in his hands; on application, he refuses to pay the libellants; and the question is, what is the mode of redress?

We are of opinion that the libellants had a double remedy: They had an action at law, for money had and received to their use; and they were entitled to a supplemental libel, upon which a decree and order might have been obtained, to compel the marshal to pay the money. Such a libel is nothing more than a form of proceeding, to carry into execution the original decree; and if the admiralty courts are competent to give judgment, they must be competent to carry it into execution.

We are also of opinion, that if a marshal makes distribution, without the orders of the admiralty court, he does it at his peril. The list or return of the crew by the captain, is no justification for his payments. He is the officer to carry the decree of the court into execution, and he must take care that his payments are made according to such decrees; for, on misapplication of the payment, a libel will lie to make him responsible. If he would therefore act safely, he ought, before he makes his payments, to obtain the order and direction of the court; and the admiralty courts ought not to make an order, without previous measures to guard against fraud and imposition, by providing for latent claims.

But on the second ground, it is said, the decree below ought to be reversed; which is, that the libellants are not part of the privateer's crew, nor captors, entitled to the prize stated in their libel.

It

1782.

It is proved, and admitted on all hands, that the libellants were shipped on board the privateer, at *Philadelphia*; that they were shipped under the articles of agreement, and shipped and received on board, as part of the privateer's crew; that, as part of the privateer's crew, they navigated the privateer down to *Chester*; that there the captain, without any objection to their skill or ability, ordered them on shore, and obliged them to abandon the privateer, and left them; and that afterwards he, and all the residue of the crew, destroyed the original articles of agreement, and executed a fresh set.

Kane et al.
V.
Brig Gloucester.

Under the circumstances stated and admitted, we are of opinion, that the libellants are entitled to a full proportion of all prizes which were captured during the cruize, for which the libellants were engaged, and from which they were forcibly excluded.

We have already observed, that the right of the crew to captures is not founded on the articles of agreement; but on the privateer's commission. When the libellants were shipped at *Philadelphia*, and received on board by the captain as part of the crew, the right under the commission attached. This right they derived from an authority, paramount to the captain, and therefore the captain could not arbitrarily deprive them of it.

But it is said, the captain, only, did the wrong; and therefore he alone should be responsible for it, and not the residue of the crew.

The libellants do not seek a compensation for a *wrong*; they are not in pursuit of damages for a *tort*. When they were shipped and received on board at *Philadelphia*, they then became part of the crew, and the right to capture and make prizes was a right they held jointly with the ship and officers, and residue of the crew. The articles of agreement directed the distribution, and ascertained the share; and the libel is for shares, according to the articles. The demand, therefore, which the libellants make, does not lessen the

1782. shares of the residue of the crew, nor call on them for Keane et al. a compensation: it is a demand, which the residue of Brig Gloes-^{v.} the crew acknowledged, and agreed to, when they ex-
- ter. ecuted the articles.

But it is said, on the dismission of the libellants, their proportion of the risk and labour fell on the residue of the crew; and, therefore, they ought to have an additional compensation beyond the articles of agreement.

Whatever compensation they may, in justice, be entitled to, they cannot dispense with, nor derive it from the articles of agreement. The articles make no provision for such events, and no man, on board, can claim beyond the extent of the articles. On this ground it is, that although a mariner, who is once shipped on board, and is dismissed by the captain, without fault, before the voyage is ended, is entitled to his stipulated wages, for the whole voyage; yet the residue of the crew can only claim to the extent of their contract; although, by the dismission of such mariner, the risk and labour become proportionally greater.

But, it is said, that after the dismission of the libellants, new articles were executed by the captain, and residue of the crew; by which their shares of prizes were augmented, in proportion to the lessening of the crew, by the libellants' dismission; and, that the libellants' claim affects their right, under the subsequent articles.

The captain and the residue of the crew could not cancel the original articles of agreement. When a contract is made, it can only be dissolved by the consent of all parties. The after articles, therefore, cannot affect the original articles, nor authorise a departure from them.

These articles, instead of militating against the libellants' claim, tend to establish it on another ground: for, they shew that the residue of the crew approved of the

the dismission, and therefore ought to be considered as *participes criminis*, and equally responsible with the captain.

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ter.

But, it is said, "that the libellants did not, by any personal service, contribute to the capture in the present case; that the prize was taken by the ship, the captain and officers, and residue of the crew; and, that although the libellants had a right under the commission to make captures, yet the right was not exercised in the capture of the prize in question."

The ship, captain, officers, and crew, were joint-tenants of the right to capture and make prizes conceded by the commission. Whatever was acquired in consequence of this joint right and interest must be considered as common stock, and like the case of a joint partnership, not subject to survivorship. Where the right and interest is a joint concern, the question never can be material, which of the parties have been most active and alert: the only question that can arise must be, whether the joint concern and interest is fairly subsisting.

Upon the whole, we are of opinion, that the decree below be affirmed, with costs to the libellants.

Miller

Miller v. The Resolution.

1781.

U. States, by their alliance with France, were not considered as parties in the capitulation made by the Marquis de Bouillé with the inhabitants of Dominica.

THE ship *Resolution*, belonging to *Brandlight and Sons*, merchants in *Amsterdam*, sailed from the *Texel* on the 9th of *January* 1780, bound for the island of *St. Eustatius*. This voyage was interrupted by stress of weather, which obliged her to put into *Lisbon*, where she remained some months to refit, but afterwards arrived at *St. Eustatius*. From *St. Eustatius* she sailed for the island of *Dominica*, where she arrived on the 1st of *October* 1780. In *March* 1781, she sailed from *Dominica* for *Amsterdam*, with a valuable cargo of sugar and coffee, shipped by sundry persons, certified to be *capitulants in the island of Dominica*; which cargo was consigned to Messrs. *Brandlight and Sons*, of *Amsterdam*, the owners of the vessel. Soon after the commencement of her voyage from *Dominica*, she was captured by a British armed vessel, and taken as prize into *Nevis*, where admiral *Rodney* examined her papers, and thereupon dismissed her. She again proceeded on her voyage, but was afterwards captured by another British vessel, from whom she was recaptured by an American privateer; from this privateer she was again taken by a British ship, and finally retaken from her by *Peter Miller*, the libellant in this cause, and sent into the port of *Philadelphia*. It is not contended but that in each and every of the captures and recaptures, she remained more than twenty-four hours in the possession of the conqueror. Being thus found in the hands of the enemy, and taken from them by force of arms, the libellants pray that both ship and cargo may be condemned as lawful prize and booty of war.

But

But it has been contended in behalf of the claimants, that it appears in testimony that the island of *Dominica* did on the 7th of *September* 1778, surrender by capitulation, to the marquis *de Bouillé*, general of the French forces in the windward islands: that by the terms of this capitulation, all the property and estates in *Dominica*, with their produce were secured to the inhabitants, and protected from confiscation; particularly by the seventeenth article, in these words: "The merchants of the island may receive vessels to their address from all parts of the world (English vessels excepted) without their being confiscated; and they may sell their merchandize, and may carry on their trade, and the port shall be entirely free for them for that purpose, paying the customary duties paid in the French islands." And it is alleged, that this privilege and protection was extended to absent persons having property or concerns in the island, by virtue of the ninth article of the same capitulation in these words: "The absent inhabitants, and such as are in the service of his Britannic majesty, shall be maintained in the possession and enjoyment of their estates, which shall be managed for them by their attorneys." That these *United States* being in strict alliance with the court of *France*, are bound by the terms of every capitulation, convention, or treaty, which the court of *France*, or any person or persons under that authority, shall make in the course of the war, the war being a common cause, and both allies principals in the conduct of it: that it was also in proof, that the king of *England*, by his proclamation, dated in *December* 1780, extended the effects of the capitulation of *Dominica*, to Dutch vessels for four months, notwithstanding the rupture between *Great Britain* and *Holland*, by the capture of *St. Eustatius*: and, that this ship, under the sanction of the said capitulation which secured her and her cargo from capture by the French or Americans, and

under

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tion.

1781. under the said proclamation, which protected her from
Miller British capture, sailed from *Dominica*, with the pro-
The Resolu- perty of capitulants on board; and that the passport of
tion. Monsieur *Duchilleau*, the French governor of *Domi-*
nica, endorsed on the manifesto of the cargo, ought to
protect this property from being made prize of by the
friends and allies of *France*.

It has been further insisted, that a recaptor acquires no other right than what the captor had; inferring that as the British captor could not have procured a condemnation (as appears by the acquittal of admiral *Rodney*) neither can an American recaptor make this vessel legal prize; that the British captain should be considered as a pirate, and that the law is, that goods taken by pirates, and again retaken from them, shall be restored to the former owner; that if it should be objected, that most of the real consignees of this cargo are not inhabitants of *Dominica*, and therefore not within the capitulation; it is answered, that article the ninth extends the operation of this capitulation to absent inhabitants, even such as are in the service of the king of *Great Britain* having property in the island, whose business may be transacted by attorneys; and that if the attorney is an inhabitant, and signed the capitulation, it is the same thing in effect as if the principal had done it. And lastly, that although no express authority can be produced to prove directly that allies in war are bound by the capitulations, conventions, and treaties of each other, reciprocally; yet a striking analogy may be found in the case of *ransom*. That it cannot be denied, but that if a French vessel takes a prize and *ransoms* her for a limited time, the ransom bill would protect the property from capture and condemnation by the Americans. If, therefore, the act of an individual captain of a French privateer can screen the property of an enemy from an ally, much more should the solemn capitulation of a French general

neral with the whole inhabitants of a captured island bind the same ally.

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To this it has been replied: that the ship *Resolution* and her cargo were found in the possession of the enemy, who held the same by force as their property for more than twenty-four hours, which brings the case strictly within the ordinance of congress of *February* last, which excludes any claims of former owners after a possession of twenty-four hours by the enemy: that we have no business to inquire by what right the enemy became possessed; it is sufficient for us that we found it there: that the doctrine respecting pirates does not apply, because the British, as a sovereign nation, has an undoubted right to wage war, and to take prizes, which pirates have not: that if any subject of a sovereign power takes unlawfully, let him or his prince answer the wrong, the recaptors at war with them being altogether blameless, whose right to take from an enemy cannot be doubted: that it appears evidently by the letters and other exhibits in this cause, that this cargo is in fact British property, and not the property of the inhabitants of *Dominica*; and although consigned to merchants in *Amsterdam*, the net proceeds were to be remitted to merchants in *London*, and other parts of the British dominion: that it is absurd and untrue to suppose that the benefits of the capitulation were designed to extend to *London* merchants who had never been inhabitants of the island of *Dominica*, and who are and will remain British subjects, aiding, by their wealth and influence, in the war against *France* and her allies: that the capitulation included only real inhabitants, either present on the island, or absent on business at the time, and placed them in a state of perfect neutrality with respect to the war; a character which can by no means be applied to the real consignees of this cargo: that if the effects of this capitulation were to be thus extended, *France* would have obtained

1781. obtained a conquest which can produce nothing but expense, trouble, and loss to her, but will tend to strengthen and enrich the enemy; and that it would be, for the present, the interest of *Great Britain* to surrender all her *West India* islands upon the same terms.

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It has been further urged by the counsel for the libellants, that allies are not mutually bound by every *ex parte* treaty or convention: that consent is necessary to include one in the engagement made by the other; as for instance, in a truce or cessation of hostilities: that *France* does not deem herself so bound, is evident from her conduct with respect to *Bermuda* and the *Bahama* islands, whose property congress have exempted from capture and condemnation by Americans; yet their vessels are confiscated in the French courts of admiralty: and that this exemption, granted by congress to Bermudians, runs strictly parallel with the terms granted by the French general to the people of *Dominica*, so far as allies in war were to be affected by such treaties.

That the law respecting *ransoms* cannot apply to the present case, because, if, after our ally has made a capture, and discharged the prize on a promised ransom, we should violate the ransom bill, we should in fact plunder our friend of his actually acquired property; and it is for this reason that allies are bound by ransom bills: that this case coming precisely within the ordinance of congress respecting twenty-four hours' possession by the enemy, this court is bound to decree according to that ordinance, and hath no power to judge how far its operation may, or may not, under particular circumstances, affect the terms of our alliance with *France*, the true limits of which are only to be ascertained by the sovereignty of the states, and are not submitted to the determination of this court.

That, as to the passport subscribed by monsieur *Du Challeau*, he did it as a matter of course in consequence

quence of the depositions annexed to the bills of lading, which were taken by the British judge of the island, and who might probably be in the interest of the parties; or, at least, that it was done with the official negligence too usual in passing customhouse papers. It was further suggested, that the manifest variance between the bills of lading, with their depositions annexed, and the private letters of advice found on board; the direct fraud manifest in some of those letters, and the mysterious complexion of others, are alone sufficient to justify a condemnation of this property; double papers and fraudulent clearances being legal cause of confiscation.

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Miller

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tion.

In short, that this whole business appears to be a mercantile scheme concerted between British merchants and *Brandlight and Sons*, of *Amsterdam*, in conjunction with the shippers at *Dominica*, to impose on the French governor, and to derive an unfair advantage from the liberal terms of the capitulation: that, if this property is to be deemed *neutral*, the true doctrine is, if a neutral voluntarily puts his property on board an enemy's ship, he does at his own risk; but if an enemy unjustly takes neutral property, and the same is retaken, the remedy is against the enemy who did the wrong, and not against the recaptor who only did his duty: that it is true, that the passport of governor *Duchalleau* recommends this vessel to pass unmolested by the friends of *France*, but does not say she shall not be taken from the enemy in case she should fall into their hands: that if the inhabitants of *Dominica*, in their present situation, be considered either as French or as British subjects, still the recapture is good; if French, then the property (supposing it to belong to the shippers) having been more than twenty four hours in the possession of the enemy, is prize to the recaptor by the marine ordinances of *France* and

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tion.

America; if British, it belonged to the enemy, and is therefore prize. And lastly, that this capitulation should not be construed to extend further than the protection of property upon the island, and within its ports and harbours, but cannot reasonably be expected to insure safety on the high seas in the midst of a raging war.

This cause, so far as it respects the cargo of the ship *Resolution*, rests principally on one question, viz. whether the *United States* by their alliance with *France*, are, or are not to be considered as parties in the capitulation made by the Marquis *De Bouillé* with the inhabitants of *Dominica*. No authority has been produced, and I believe that none can be, to shew that allies are mutually bound in all cases. It is manifest, that it is not generally so understood; because it is usual in forming treaties of alliance to insert special clauses specifying those cases, wherein the promises and engagements of the one shall bind the other: for it would be a very dangerous doctrine that should bind sovereign powers in engagements to which they had neither expressly nor implicitly given consent, or that one ally should necessarily become a party in the conventions which the generals and officers of the other may, under particular straits and circumstances, make with the common enemy, unless the ally be mentioned in the convention, and the terms thereof be afterwards acceded to by him. Thus, in the case of *Dominica*, had governor *Stuart*, when he surrendered the island to the Marquis *De Bouillé* expected that the *United States* should be bound by the terms of the capitulation, he would have made this one of the articles, and not entrusted so important a point to a speculative question, how far one ally may or may not be virtually bound by the engagements of the other. This, however, he has not done, either because it would imply

ply an acknowledgment of the sovereignty of the *United States*, or because he deemed the objects of the capitulation to be limited to property within the island. Be this as it may, the British could not reasonably complain that the French had violated the articles of the capitulation, should the Americans take the goods of the inhabitants of *Dominica* found upon the high seas, because such an assurance made no part of the stipulation. "If he who can and ought to have explained himself clearly and plainly, has not done it, it is the worse for him; he cannot be allowed to introduce subsequent restrictions which he has not expressed." *Vattel*, b. 2. c. 17. s. 174.

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But whatever doubts there may be of the right of Americans to take the property of the people of *Dominica* under the present circumstances, there can be none of taking British property, wherever found, without any danger of impairing the friendship of our good ally. And from a scrutiny of the papers found on board this vessel, there is strong reason to believe that this cargo, however artificially covered, is, in fact, British property.

As to the general doctrine respecting allies, the case of Bermudas is, I think, strong in point. The vessels of that island were by congress exempted from capture by Americans, and yet the French made prize of them whenever they could; nor was it ever suggested that they had thereby violated the faith of the alliance. Had the British expected, or *France* desired, that the *United States* should be parties in the capitulation of *Dominica*, it cannot be doubted, but that this would have been made one of the terms of that capitulation, or that *France* would, before this, have signified her desire to congress, and that congress would have instructed the masters of privateers as to this matter.

Having

1781. Having made no national agreement to spare the property of the people of *Dominica*, when found on the high seas, much less are we bound to rescue it from the hands of an enemy at our risk and expense, in order to restore it, salvage free, to their use. This would be to put them on a better footing than our own merchants, whose property, after twenty-four hours' possession by the enemy, would be confiscated to the recaptor, whereas it is contended that no confiscation whatever should pass on the property of the people of *Dominica*.

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Being fully satisfied as to this general point, it renders a minute display of the striking contradictions between the bills of lading and letters of advice, and other papers found on board this vessel, the less necessary. Many of them are manifestly fraudulent; and although the property is carefully wrapped in neutral covers, the net proceeds appear to be finally intended for subjects of *Great Britain*, residing at *London*, or elsewhere.

With respect to the king of *England's* proclamation, I conceive that it is founded on partial, not on general grounds. Were it not that this, with four or five other Dutch vessels were at this time to sail from *Dominica*, freighted with the property of British merchants, it is more than probable that this proclamation had never been published.

I adjudge that the cargo of the ship *Resolution* be condemned as lawful prize to the libellants; and that the ship *Resolution*, with her tackle, apparel and furniture be restored to *Brandlight and Sons*, merchants of *Amsterdam*.

N. B. The claimants appealed from this decree; and, after long argument, the judges of appeal reversed the decree, so far as the same respected the condemna-

tion

tion of the cargo, which they fully acquitted, upon the
shippers paying freight to the owners of the ship.

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Miller

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tion.

There was afterwards a rehearing of this cause before the court of appeal, on a suggestion of new testimony having been found amongst some papers taken in a ship (the *Ersten*) bound from *Ostend* to *Dominica*; but the court adhered to their judgment; except only as to some part of the cargo, which was condemned on account of irregularities in the bills of lading, and letters of advice, respecting those particular articles.

Nicholas

1781.

Nicholas Hainey v. The Tristram Shandy and Dimsdale.

If a single mariner withholds his consent, and the cruize is broken up by the rest of the concerned, and a new cruize commenced, this must be done subject to the legal claim of the unconsenting mariner, of wages or prize money that may accrue during the term of the first cruize for which he contracted.

HAVING entered as a landsman on board the privateer *Rising Sun*, and signed articles for a cruize of four months: the privateer was successful; and the libellant was sent in with one of her prizes, and soon afterwards fell sick. During the cruize the *Rising Sun* came into port to refit. Being at *Philadelphia*, a great part of the crew left her; whereupon the captain (or owners) published an advertisement, calling upon the officers, seamen, and mariners, belonging to the *Rising Sun*, to repair on board by a certain day, in order to complete the cruize. One third of the crew, however, neglecting to appear, the owners and officers agreed to break up the cruize, opened a new rendezvous, and enlisted a crew under a new set of articles. The ship sailed on this second cruize, the four months of the first having not yet expired. Soon after her last sailing she captured the *Tristram Shandy*, and the *Dimsdale*, both which were condemned as prize. It appeared in testimony, that the *Tristram Shandy* was taken before the expiration of the first cruize, and the *Dimsdale* some days after. The libellant did not appear on the day advertised, neither did he sign the second set of articles, being sick at the time.

As this cause touches a general doctrine, viz. how far owners are justifiable in breaking up a cruize, without the consent of all concerned, it wears a face of considerable importance. I have attended to it in this view, and am of opinion, that shipping articles form a contract between the owners on the one part, and the officers and crew on the other, and are for the period specified, in full force with respect to the contracting

tracting parties. And this contract is not made with the officers and crew as an aggregate body, but with each mariner individually. Upon this ground, I think ^{Hainey} _{The Tristram Shandy.} the contract cannot be totally dissolved (as hath been contended) by the will of any majority on either side, however great. If a single mariner withdraws his consent, and the cruize is broke up by the rest of the concerned, and a new cruize commenced, as in the present case, this must be done, subject to the legal claim of the unconsenting mariner, of wages or prize money that may accrue during the term of the first cruise for which he contracted. If it were otherwise, if owners could for their own convenience, or from an apparent or real necessity, break up a cruize, those of the crew who may be languishing in captivity, or may be confined on shore by wounds or sickness incurred in the service of the ship, or otherwise, might be excluded from the advantages of a period of time for which they had engaged to run all hazards, and of which they may as yet have only experienced the misfortunes.

Judgment—That the libellant have a landsman's share of the prize brig *Tristram Shandy*, and that the bill be dismissed with respect to a share of the *Dimsdale*.

Gibbs

Gibbs v. The Two Friends.

1781.

Clearing out as for one legal port, but with a design to go to some other legal port, in order to conceal the real voyage, for mercantile purposes, is never deemed an offence, nor have the papers found on board a vessel under such circumstances, been considered as double papers, such as should induce a condemnation. If such a vessel be captured, the owner may be liable against the capturing vessel and her captain, for reparation of the loss and damage sustained by such capture.

THE brig *Susannah*, belonging to *George Gibbs*, cleared out from the naval office in the port of *Rhode Island*, and sailed with a cargo on board, as for *Hispaniola*, but in fact for *Turk's Islands*. Being on her voyage she was discovered, pursued, and captured by *Josiah Crane*, master of the brigantine *Two Friends*, belonging to subjects of the *United Netherlands*, and furnished with letters of marque and reprisal against the subjects of the king of *Great Britain*. *Holland* had not at this time entered into any treaty with, or acknowledged the independence of, the *United States of America*. Captain *Crane* took out part of the crew of the *Susannah*, and put a prizemaster on board, and ordered her for *Philadelphia*; but the *Susannah* was again captured during her voyage to *Philadelphia* by a British privateer, taken to *New-York*, and there condemned. The *Two Friends* arrived at *Philadelphia*, where *Gibbs* the owner of the *Susannah* libelled against her, and against captain *Crane* for reparation of the loss and damage sustained.

In considering this case, two obvious points present, viz.

1st. Hath the brig *Susannah* so offended by her intended voyage to *Turk's Islands* as to afford probable cause of capture and confiscation?

2d. If not, who ought to satisfy the owner for the loss of his vessel and cargo?

On the first point the question occurs, whether *Turk's Islands*, may, or may not, be considered as property under the dominion of *Great Britain*? What-

ever

ever might have been the situation of these islands in the years 1778 and 1779, it is evident that at present they are abandoned by every nation, there having been no officer who hath exercised civil or military powers there under the authority of any government whatever for at least these two years past. If the British ever had legal dominion over these islands, they have abandoned their right, and released the inhabitants from all allegiance by withdrawing all protection. So that those people may truly be said to be in a state of nature, unless they have formed some government of their own. What offence then can arise from trading with those islands? It is plain, from the clearances and entries in our own naval offices, that this trade hath not been deemed unlawful: and it is also in evidence, that American, French, and Spanish vessels constantly go to these islands for salt, and nobody hath heretofore questioned the legality of this commerce.

But it is said, that the variance between the office clearance and an invoice found on board, marking the real destination of the voyage, affords probable cause of capture, and even a sufficient ground for confiscation. I find, however, that it is not an unusual practice for merchants to clear out as for one legal port, but with a design of going to some other legal port, in order to conceal the real voyage, for mercantile purposes. Nor hath this practice ever been deemed an offence, or the papers found on board a vessel under such circumstances been considered as double papers, such as should induce a condemnation.

The next question is, Who ought to be answerable for the injury done? the captain, or his owners, or both?

The relation between the owners and master of a vessel hath, to many purposes, been considered as that of master and servant; and the law is clear, that the master is bound by whatever the servant doth by his

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The Two Friends.

1781.

Gibbs

v.
The Two
Friends.

order, under his authority, or in the prosecution of his service. See 1 *Black.* 429. It has been contended, however, that captain *Crane* was not in the prosecution of his owners' service, when he made this capture, the object of the voyage being merely mercantile, and not to take prizes. But as this vessel was duly commissioned to take prizes, and the owners and captain would have shared the produce of a legal capture, this distinction cannot be admitted, but the owners and captain must be considered as jointly answerable.

Judgment in favour of the libellants for 1305*l.* specie, with costs.

N. B. An appeal, and the judgment confirmed.

Clinton

Clinton v. The Brig Hannah and Ship General Knox.

1781.

A PLEA to the jurisdiction of the court was filed in this cause: and the question was, Whether a *shipwright* might sue in the admiralty for his contract wages for building a ship or vessel designed for navigation on the high seas?

After long argument, the judge gave his opinion as follows.

The authorities which the libellants have urged in favour of the jurisdiction of this court, in the present case, are Cro. Ch. 296. and 1 *Rolle*, 533. All the other authorities adduced having reference to those, except one in 1 *Stra.* 707.

In the first edition of Cro. Ch. p. 296, we find resolutions upon cases of admiralty jurisdiction subscribed by all the judges of both benches, in April 1632; wherein, amongst other things, it is resolved that a shipwright may sue in the admiralty, provided his suit be against the ship. *Rolle*, as a faithful abridger, gives the law as it then stood under the authority of these resolutions. In article 19, he mentions the doctrine respecting shipwrights, and cites the case of *Tasker and Gale*. And in article 21, he gives the law respecting charter-parties, adding these remarkable words: "As it was declared by the court to have "been lately resolved by all the judges of *England*." So that those resolutions seem to be the only foundation upon which these doctrines rest. And it is very observable, that although *Croke* records the resolutions as they were subscribed in *Hilary* term, the eighth of *Charles*, yet he does not report the case of *Tasker versus Gale*, although adjudged (according to *Rolle*)

A ship-wright can-not sue in the admiralty for his contract wages for building a ship or ves-sel designed for naviga-tion on the high seas.

1781. *Rolle*) in the ninth of *Charles*, which must have been Clinton but a few months after. Neither hath any other reporter of that period noticed this case. From which it seems probable, that those resolutions, and the judgment in the case of *Tasker versus Gale*, were not admitted as good law even in that day.
 v.
 Brig Hannah.

But it is further observable, that when sir *Harbottle Grimestone* published *Croke's Reports* in the year 1657, he prefixed, even to this first edition, a declaration under the title *Mantissa*, that the resolutions of the judges in *February 1632*, were not of authority: and for this reason (according to *Comyns*) those resolutions were totally omitted in the subsequent editions of that work. Since that time no instance can be found in the books, where either these resolutions, or the case of *Tasker versus Gale* adjudged thereupon, have been referred to either by the court, or in the pleadings in any adjudged case, except in the case of *Wooward versus Bonithan*, sir *T. Raymond*, p. 3.: and there the court declared, that those resolutions had been denied by several judges, and renounced by even some of those who had subscribed them. And of this, *Danvers* also takes particular notice, p. 271. Therefore the authority of these resolutions seems to have been abolished by general consent.

But another case has been referred to as authority in point, viz. 1 *Stra. 707*. The report is very short, and in these words: " On a motion for a prohibition, " it was held, that a *carpenter* may sue for wages in " the admiralty." This report, however, is too slight and solitary to authorize a decision contrary to general established rules. The word *carpenter* doth not precisely indicate a shipwright, but may be applicable to a mariner on board a vessel; and as the cases referred to in the margin of this report, respecting the officers of a ship who sued in the admiralty as mariners,

ners, the probability is, that this also was an officer called the *ship's carpenter*: A doubt having arisen whether the subordinate officers of a ship, as well as ^{v.} *Brig Hannah*. the master, were not prohibited from suing in the admiralty for wages.

If the resolutions of the judges in 1632, and the decision in the case of *Tasker versus Gale*, were admitted as law, and if the carpenter mentioned in 1 *Stra. 707.* was the shipwright or builder, how is it possible that the judges so lately as the year 1765, should declare in court, that no instance could be found where both the contract and service were to be done on land, within the body of a county, that the common law courts ever permitted the admiralty to have jurisdiction? I refer to 2 *Wilson*, p. 265: and this opinion was given in the case of a pilot suing for services done, indeed within the body of a county, but in a case of a much stronger maritime complexion than the present.

There are several exceptions to the general rules of law respecting admiralty jurisdiction, as ascertained by the statutes: such as suits for mariners' wages, and on hypothecations made by the master in foreign parts, &c. &c. which have been so often contested, and so often allowed, for good and weighty reasons, that they have become confirmed law, and it would be in vain now to oppose the general rule to the general practice. But this does not appear to be the case with respect to shipwrights; neither are the same reasons applicable to them. Their contract is made with persons whom they know, or ought to know; their services are all executed within the body of the county, and mostly on dry land above high water mark; their wages have no reference to a voyage performed, or to be performed; the shipwrights have no interest or concern what-

ever

1781. ever in the vessel after she is on float, and the merchant hath paid for her; and lastly, the practice of former times doth not justify the admiralty's taking cognizance of their suits.

Clinton
V.
Brig Hannah.

Let the bill be dismissed, as not being within the jurisdiction of the court.

Pierre de Moitez v. The South Carolina.

Mariners en-
listing on
board a ship
of war or
vessel be-
longing to a
sovereign in-
dependent
state, cannot libel against the ship for wages due.

ON a plea to the jurisdiction, it was adjudged, that mariners enlisting on board a ship of war, or vessel belonging to a sovereign independent state, cannot libel against a ship for wages due.

McCulloch

M'Culloch v. The Ship Lethe.

1781.

M'CULLOCH had shipped on board the *Lethe* in time of war, for a certain voyage from *Philadelphia* to *Bourdeaux*, and back again, at the wages of 18*l.* per month. The ship was detained long at *Bourdeaux*, and whilst she was there, peace took place. The libellant performed the voyage, but was refused the wages on account of the peace, on a suggestion that the risk, which was the occasion of the high wages being removed, the libellant ought to have only customary peace wages from *Bourdeaux* to *Philadelphia*.

Judgment in favour of the libellant for wages agreeable to contract.

the decrease of the risk on the homeward voyage.

Show

1781.

A surgeon
ships at Phi-
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time of war,
for Bour-
deaux and
back again.
While the
ship is at
Bourdeaux,
peace takes
place. The
ship returns
to Philadel-
phia, which
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the voyage.
The sur-
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ges shall not
be lessened
on account
of the de-
crease of the
risk on the
homeward
voyage.

THOMAS SHAW, the libellant, entered on board the ship *Lethe*, as surgeon, and contracted to serve in that capacity from *Philadelphia* to *Bourdeaux*, and back again, for the wages of 15*l.* per month. It was then war, and so continued till the vessel arrived at *Bourdeaux*: whilst she was there in port, peace took place. The libellant continued on board, and returned with the vessel to *Philadelphia*, and now demands the stipulated wages of 15*l.* per month, notwithstanding the peace.

Much has been said respecting the entirety of contracts on the one hand, and the divisibility of contracts, particularly those of insurance and mercantile agreements, on the other.

It has been urged for the libellant, that the voyage to *Bourdeaux* and back again, must be considered as one entire voyage; and that if this vessel had been insured, or chartered, there could have been no apportionment of the premium or hire on account of the peace.

Against this doctrine, the case of *Stephenson versus Snow*, 3 *Bur.* 1237, has been cited, and fully considered. The case was—a ship was insured for a certain premium, to sail from *London* to *Halifax*; the insured warranting that she should sail with convoy from *Portsmouth*. She arrived at *Portsmouth*, but the convoy was gone. Whereupon a return of premium was demanded, deducting only the customary insurance from *London* to *Portsmouth*. The entirety of contracts was here urged against the insurers, but over-ruled by the

the whole court, who considered the contract as divisible, and having reference to two distinct voyages, viz. from *London* to *Portsmouth*, and from thence to *Halifax*; and determined that as the risk of the second voyage had never been begun, the premium for that had never inured.

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v.

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This case appeared at first view to apply closely to the present; but, on a nearer inspection, I find that the warranty to sail with convoy was the ground of that decision. It was that alone which rendered the voyage divisible, because it was of the essence of the contract. Had the ship sailed without, and been lost, the insurers would not have been answerable. Had she been insured from *London* to *Halifax*, without any condition annexed, and had stopped on her way at *Portsmouth*, and proceeded no further, the voyage would not, I apprehend, have been deemed divisible on that account, nor the premium apportioned; so that the warranty to sail with convoy was the foundation of the contract, which failing, the contract failed, so far as the same had respect thereto. The voyage from *London* to *Portsmouth* seems to be no more than a necessary passage to the place where the substantial part of the contract was to take effect; where the premium was to be earned by the commencement of the risk under the condition specified.

But I find nothing parallel with this in the articles of the ship *Lethe*: no contingency mentioned; but only a simple contract for a voyage to *Bourdeaux* and back again, in consideration of certain services to be performed on the one part, and certain wages to be paid on the other. If there is any similarity in the two cases it consists in this: that, as in the one, the sailing with convoy was the ground of the *quantum* of the premium; so in the other, the war was the ground of the *quantum* of wages. In the case referred to, the contingency

was

1781. was fully recognized in the contract: the ship was warranted to sail with convoy, but no contingencies are provided for in the *Lethe's* articles. If the insured vessel had sailed with the convoy, though but for one day, and returned, it cannot be supposed that any part of the premium would have been restored.

That the mere arrival of a vessel at a port or ports cannot be construed as a division of the voyage delineated by the articles, is manifest from a current of law and practice; so it was determined in the case of *Bernon versus Woodbridge*, *Douglas* 753, and numberless charter-parties, insurances, and articles for mariners' wages have reference to circuitous voyages. Nor was it understood, that a fortuitous increase or diminution of the risk, or any alteration of circumstances between one port of destination and another, would affect the contract, unless provided for by the terms of the agreement.

But it hath been strongly urged, that the high wages promised, and the nature of the service to be performed, have reference to war only; and that as peace took place whilst the vessel was safe in port, the voyage, from the manifest object of the contract, became divisible: and that it would be very hard to bind the master or owners to the most severe construction of the articles, and make them pay for services, which, from an unforseen change of affairs, were rendered impracticable.

Although there is an equitable force in this argument, yet, under the circumstances of the case, there seems to have been an obvious duty on the part of the master to have entitled him to an equitable relief from the binding force of the articles. He should have proposed to pay off the crew at *Bourdeaux*, and tendered a new contract on peace establishment, protesting against the former articles. Nor is this a mere ceremony,

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Shaw

v.

The Letitia

remony, but what substantial justice seems to require. The mariners, under the articles, could not leave the ship without incurring a penalty. If then they are detained on board without any explanation, notwithstanding the great change of circumstances, they had sufficient reason to conclude, that they were continued in the service upon the terms of the subsisting contract: and this reasoning will well apply if the case be reversed. Suppose the mariner had engaged in time of peace, and war had broke out during the voyage, and he had made no declaration that he was dissatisfied with the terms of his contract, or expected war wages in consideration of the risk he was to run, I believe there are few masters of vessels who would not urge his silence as an acquiescence in the continuation of the contract, and bind him down to the terms of the original contract.

It is so natural to expect some declaration of the will of contracting parties, when circumstances out of the reach of either have occurred, which totally alters the principles upon which the contract was formed, that an omission of such declaration can have no other interpretation, but that of wilful neglect or deep design, neither of which is the law disposed to countenance. Hence, probably, arose the custom of protests, in cases of wreck, illegal capture, fire, and other unforeseen and unavoidable accidents.

One other argument hath been urged for the respondents, viz. that freight is the mother of wages; inferring, that as this vessel received only peace freight from *Bourdeaux* to *Philadelphia*, no more than peace wages ought to be allowed for that part of the voyage.

It does not appear in testimony what freight this vessel received: but if it did, I see no force in the argument. There is, in fact, no connexion between freight and the quantum of wages; nor are the mari-

ners

1781. ^{Shaw} _{The Lethe.} ners ever privy to the terms on which a cargo hath been shipped. It is only a law of policy which arbitrarily makes the payment (not the rate per month) of the wages to depend on the safe conduct of the cargo, in order to induce the mariners to exert themselves in case of wreck, to save as much as possible, knowing, that if the whole be lost, they must lose the whole of their wages. If the freight is thus called the mother, the service performed may well be deemed the father, of the mariner's wages, that being the real and legal consideration. There is no doubt but the mariner shall have his wages, in cases where no freight at all is received; as in vessels sailing with ballast only, which often happens. The truth is, the mariner's lien is on the ship, and not on the cargo. Nor was it ever known, that freight could be attached in the merchant's hands to answer for mariner's wages, but the ship is liable under all circumstances.

I have not noticed the ship's going to *Teneriffe* from *Bourdeaux* before she came to *Philadelphia*, as this circumstance, if it has any operation at all, must be against the master, who ought not to benefit by his own deviation from the articles.

After mature consideration, I cannot find sufficient reason to give a different decision now, from what was lately given in the case of *M^cCulloch* against the same ship. The continuation of the libellant on board, after it was known that peace had taken place, without any declaration of the master, that he expected the terms of the contract should be changed, is too strong a circumstance to be got over.

But, as I think it a hard case, I would recommend an appeal; that the law and arguments may be again considered by another court.

Judgment.—That the libellant receive wages agreeably to the contract; and that he pay one half, and the respondent the other half of the costs of suit.

N. B.

N. B. An appeal—and the court of appeals confirmed the above sentence; and gave the appellee costs of suit, and interest on his wages, from the date of the decree in the admiralty. 1781.
Shaw v. The Lethe.

Brice and Woodroff v. The Nancy.

1783.

THE libellants entered on board the *Nancy* in January 1783, and signed articles, according to custom, for a certain voyage to *L'Orient*, and back again to the port of *Philadelphia*. *Brice* engaged to serve in the capacity of first lieutenant, and *Woodroff*, as surgeon to the ship, which was an armed letter of marque. By these articles *Brice* was to receive 18*l.* and *Woodroff* 17*l.* per month. At this time it was war between *Great Britain* and the *United States of America*. The ship fell down the river in order to commence her voyage, but from various causes of delay, did not clear the Capes, so as to enter on the high seas before the 20th of March following. In the mean time, viz. on the 3d of March, peace had taken place, and hostilities ceased between the belligerent powers.

Mariners
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3d of March,
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field of danger,
the extraordinary
wages and only
wages after
the 3d of
March until the
completion of the voyage.

Whereupon, it has been alleged in behalf of the respondents, that 5*l.* per month are the customary wages in time of peace, and a full recompence for services for navigating a ship; that all above that sum is allowed in consideration of the risk and dangers of war. That the consideration failing, and no risk being incurred, as peace had taken place before the ship had entered on the field of danger, the extraordinary wages ought to abate, and that the libellants ought to be compensated in the completion of the voyage.

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Brice and
Woodroff
v.
The Nancy.

On the contrary, it has been urged, that the contract was duly and regularly made: that contracts are sacred things, and ought to be taken entire, and strictly construed: that contracting parties should not be admitted to explain their intentions afterwards, or re-cede from the terms of their bargain, on account of future contingencies, provided there was no fraud in the case: that the performance of the voyage, and doing the duty on board, are the true consideration of the wages: that whether these wages are high or low is a matter that should have been considered when the contract was made: that as it cannot be supposed, that if the danger had been greatly increased by the arrival from an enemy's fleet on the coast, or from any other circumstance, the owners would have allowed increased wages, neither ought they to diminish the wages, because the danger happened to be lessened by the intervention of peace. And lastly, that the voyage was actually commenced when the ship left the port, although she remained long after in the river.

The advanced wages above what is customary in time of peace is in consideration of the risk and dangers incident to war: in the present case it is clear that both parties, when they made the contract, had war in view, as is evident from the stations the libellants were to fill, viz. the one, that of first lieutenant, and the other, that of surgeon of the ship, offices unknown on board of merchantmen in time of peace. Whether it would indeed be peace or war, was a circumstance out of the reach of the parties to command. Peace, however, did take place, seventeen days before any risk whatever was incurred on account of the war.

The case of insurance cited from 3 *Burrow*, 1237, is a leading case in point. The contract there was regularly made between parties, more competent

to

to be strictly bound than common mariners, viz. the owners of a ship and the underwriters, and yet it was determined by all the judges, that this contract ought to be liberally construed; and that the insurance premium should be returned for such part of the voyage as had ran no risk.

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The cause lately decided in this court, *M'Culloch versus Lethe*, has been quoted; but there is a manifest and essential difference between that case and the present. In the former, the libellant had actually incurred the risk, had subjected himself to be killed in battle, or taken prisoner, which was the real consideration of the war wages promised; in the present case no risk from war was at all incurred: for, although much pains hath been taken to shew, that the captain and crew of the *Nancy*, not having heard of the peace, had sufficient reason to think that it was war when they sailed, and conducted themselves accordingly; yet the question is not, what might have been their apprehensions, but what was the reality of the danger, or whether it was indeed war or peace at the time?

Had this vessel advanced into the scene of danger, though but for twenty-four hours before peace had taken effect, I should have no doubt in allowing the libellants their full wages, according to the articles, upon the same principles on which wages were decreed to *M'Culloch*.

That the common law doctrines respecting contracts do not apply in all their strictness to cases maritime is evident from the constant practice of this court. The enlistment of mariners has neither the complexion nor the formalities required by the rules of common law; and it would be hard to bind men so ignorant as common mariners generally are, to the legal construction of terms, nor would it be for the interest of mariners, that articles should be so strictly construed,

1783. construed, as the operation would probably be frequently much against them.
Briee and Woodroff

v.
The Nancy. It appears, that when the libellants entered on board the *Nancy*, it was actual war, and that they held themselves in readiness to do the services, and encounter the dangers for which the stipulated wages had been promised. It was not their fault that the vessel did not forthwith proceed on her voyage. I see therefore no reason against their being allowed full wages for that period, and the common usage is to allow mariners their wages from the time of signing the articles, let the vessel sail when she may.

I adjudge that the libellants have and receive their full wages, according to contract, from the time of signing the articles, to the 3d of March last; and that they receive customary peace wages from the said 3d of March, to the completion of the voyage.

The two following Decisions are annexed by the Editor, who presumes that they will be found sufficiently important to be entitled to a place in this volume.

Shrewsbury v. Sloop Two Friends.

1786.

January.

IN this cause of *Shrewsbury v. The Sloop Two Friends*, the following appears to be a short state of the case.

That the vessel, with an American register, is owned partly by a foreign merchant, but now resident here; and partly by a citizen of the state of *Georgia*, who resides there.

That soon after her arrival in this port, the foreign part owner attached in the court of common pleas, the remaining property of the other in her, for a debt due to him by the said other part owner.

That a claim was set up against the moiety attached by a third person, who asserted that a sale thereof had previously been made to him; which contest is still pending in the court of common pleas.

That after the attachment, and while the vessel continued in the custody of the sheriff, (but by his permission remaining in the possession of the plaintiff in attachment,) *Shrewsbury*, a shipwright, was employed to repair her.

(And here there was a variety and contradiction in the evidence produced, whether *Shrewsbury* was employed by the master, or the foreign part owner; there being positive swearing to each.)

That the vessel being removed out of *Shrewsbury's* dock, he applied to this court, for a warrant to arrest her, for the repairs; which warrant issued, and was executed by the marshal, during the absence of the sheriff.

On the return of the warrant, a motion was made in behalf of the foreign part owner, that it be quashed; and the motion was supported on the following grounds:

3 I

1st. That

A shipcar-penter has no lien for repairs, after the vessel is out of his possession, if the contract was made on land, and the owners resident in the place.
See *Hopkinson*, 99. *Clin-ton v. Brig Hannah*.

1786. 1st. That the vessel being in custody of the sheriff, Shrewsbury was not within the jurisdiction of this court.

Sloop Two Friends. 2d. That the repairs being made on the vessel in port, and not while on a voyage, but by owner's order, and she being hypothecated neither by the master, nor owner, the vessel was not liable, but recourse must be had to the owner.

This motion was opposed in behalf of the actor,

1st. On the general principle, that for all repairs made and necessaries supplied to a vessel, she is liable; that an hypothecation is always implied, whether executed in form or not: and that properly, only one moiety could be said to be in the custody of the sheriff.

2d. But that howeyer the rule might be with regard to repairs and necessaries supplied at home, and in the port to which the vessel belongs; there is a difference when she is in a foreign port; that this is settled by the resolutions of all the judges in *Charles I.* time, as reported in *Cro. Ca.* 216., and that *Charleston* is to all intents and purposes, a foreign port, both to the vessel and owners; that it would be hard, if it was otherwise; for as the owner was a foreigner, and perhaps had no other property in this state, the shipwright might lose his debt, or not obtain any security for it, if the vessel was not liable.

To this last argument, it was replied, that the owner had offered any security to the shipwright, if he would wait the determination of the suit in the common pleas, concerning the attached moiety; and that he had indeed reconducted the vessel into the shipwright's own dock, where she now lay.

This being a short state of the case, and of the arguments offered on both sides, the court is now to pronounce an opinion and decree upon the whole. The principal points to be considered and determined, I think, are the following:

1st. Whether a vessel is liable for all repairs and necessaries

cessaries in general, at any time and in any circumstances. Or, 2d. Whether a distinction is to be taken, and a difference made; and that she may be liable in particular cases, and not in others; and lastly, whether her being a foreign vessel, and owned by a foreign merchant, will make any difference in the general rule on such occasions.

And with regard to the first and second points, I conceive the law to be clear and settled.

The jurisdiction of this court extending only to maritime causes, it cannot take cognizance of any transactions or contracts which arise on land. And herein I distinguish thus:

Where a vessel is lying in port, and the owner is there present, all matters and contracts, relative to her, must be supposed to be entered into by him on shore; and consequently to be *infra corpus comitatus*; and redress and satisfaction, in case of any dispute on the occasion, must be sought in the courts of common law.

But where a vessel is on a voyage, and by stress of weather, or other accident, puts into a port, the occasion happening at sea, and on her arrival in port no owner being present, to whose personal credit recourse may be had for necessities, the master, *ex necessitate rei*, has a right to procure them on the security of the vessel; and to obtain payment on that security, this is the proper and only court to apply to.

This distinction is plainly laid down and taken notice of in all the cases, where this matter has been agitated.

I will examine the several authorities, which have been cited in the present case, for and against this opinion; and from them shew the reasons upon which I ground mine.

Much stress has been laid by Mr. *Read*, on the resolutions of the judges, as reported in *Cro. Ca.* 216. in support of his argument. I shall make some observations on those resolutions.

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Shrewsbury
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Shrewsbury

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In the first place, it does not appear, that they were an adjudication on any particular case before the court. They seem merely *gratis dicta*; and this interpretation so favourable to the extent of the admiralty jurisdiction, was made but a few years after the remarkable contest between the judges of that court, and of the common law courts, which is mentioned in the 4th Institutes.

The court of admiralty at that time, claiming almost every thing; perhaps the other at first, thought it necessary to concede something more than they had a legal right to. At least it proves that some doubts prevailed on the subject; and that the jurisdiction was either not well understood, or settled on one side.

It is remarkable too, that these resolutions, which are inserted in the first editions of *Croke*, do not appear in the later. I observed the edition Mr. *Reed* quoted from is of 1657. Upon referring to mine, which is of 1669, I find them omitted. (See *Hopkinson's Reports*, 101.) From whence there is a seeming implication, that upon better consideration, they were held not to be of authority; and were therefore omitted.

This is confirmed by an adjudication in the same reign contradicting them. It is in *Bridgman's case*, Hob. 11. There, says the chief justice, "The admiralty court hath no power over any cause at land; for both by the nature of the court, and by the statute, it is to meddle with things arising upon the seas.

" But (he goes on) I was of opinion clearly, that the admiralty law is reasonable, that if a ship be at sea, and take leak, or otherwise want victual or other necessities, whereby either herself be in danger, or the voyage defeated, that in such a case of necessity, the master may impawn for money, or other things to relieve such extremities, by employing the money so; for he is the person trusted with the ship and voyage, and therefore reasonably, may be thought to have that power, rather than see the whole lost. But

" in

" in this case, the faults were, that neither the contract,
" nor the impawning were said to be for any such
" cause, nor was the impawning said to be at sea."

And lastly, the authority contended for under those resolutions is denied by all the subsequent, and late determinations on the subject.

The first, *Molloy* 333., though short, is express to the point. In *Justin's* and *Ballam's* case, *Salk.* 35. (but better reported 2 *Ld. Raym.* 805.) it is expressly laid down, " that as it did not appear the ship was on her voyage, when she was in distress, and the contract made for the cable and anchor, the case was out of the admiralty jurisdiction."

I shall have further occasion to refer to this case hereafter.

The next in point of time is *Watkinson* and *Barnardiston*, 2 *P. Will.* 367. There it was likewise determined, " If a ship is in the *Thames*, and money is laid out for repairs, &c. it is no charge on the ship; but the person employed must resort to the owner."

" But if at sea, (i. e. if on a voyage) and no contract can be made with the owner, the master, *ex necessitate rei*, may hypothecate the ship for repairs."

Here the distinction is fully expressed; the circumstances fixed, and the reason explained: " On a voyage;" and because the " owner is not present."

Of course the inference is, that if she is not on a voyage, and if the owner is present, there is no such claim on the ship, nor any such power in the master.

The master's power arises only in the absence of the owner, as his substitute and representative; and even in the owner's absence, he is not empowered on all occasions to make the ship or owner liable.

" For if he takes up money to mend or victual the ship, when there is no occasion, he only is liable.
" And it is but reasonable, that the person advancing the money should take care, that he lends it upon
" such

1786.
*Shrewsbury v.
Sloop Two Friends.*

1786. "such an occasion, as that the master's act shall bind
Shrewsbury "the owner."

^{v.}
Sloop Two Friends. These are *Molloy's* words, as cited in *Coop.* 638, which was quoted by Mr. *Read*.

It shews that the supplier of necessaries, or carpenter who repairs, runs some risque; that he ought to act cautiously, and particularly when the owner is present. For in the last case, I conceive the master cannot hypothecate the vessel; and if he did, that such hypothecation would be void, and not binding on the vessel.

But neither does that case, nor the other in *Doug.* 97. quoted by Mr. *Read*, contradict this opinion.

In the first lord *Mansfield* says, "whosoever sup-
plies a ship, has a treble security; the master, the
ship, and the owner."

True he has so: he has the security of the ship in all cases, by lien, while she continues in his possession; and in particular cases, where she is properly hypothecated, whether in his possession or not. He has besides, the personal security of the master, or owner, in either case.

I deny neither position.

In the second (*Doug.*) his lordship says positively and expressly, "work done in *England* on a ship, is on
"the personal credit of the employer; but in foreign
"ports, the master may hypothecate."

That is, he may hypothecate under the circumstances, and for the reason mentioned in *P. Wm.* 367.: "Because the ship is on a voyage, and the owner is not
"present." This distinction is continued through all the cases.

And with regard even to a lien, lord *Mansfield* speaks only hypothetically; if there was any lien, it was in the carpenter. And the general practice of shipwrights, as mentioned in the same case, seems to shew, that they looked more to the employer, than to the ship for security.

However,

However, it is, I confess, my opinion, that the shipwright has a lien on the vessel, so long as she is in his possession. But the lien extends no farther than as a security; and does not give him power to sell, nor this court to order it. And herein consists the difference between a lien and hypothecation.

I come now to the last point, whether this being a foreign vessel and owned by foreign merchants, makes any difference in the general rule laid down?

I cannot allow, that this question is applicable to the present case.

How is either this vessel or this port, foreign, when the vessel is registered as American, when she is owned partly by a citizen of the *United States*, and partly by a merchant who, though not a citizen, is engaged in a commercial connexion here; and is at present settled here?

This is now his home; and *Charleston* harbour in the present case is *quasi* the river *Thames*, in those reported in the English books.

But admitting the objection in its fullest force, I do not find that the law has made any difference on the occasion. On the contrary, there is a case directly in point, which settles it. It is that of *Justin* and *Ballam*, before quoted. There the ship belonged to *Norway*; her owners were foreigners, and *London* to both was a foreign port. There likewise were urged the same reasons, as at present, to make the vessel liable. "The defendant would be without a remedy, if a prohibition should be granted. Because, the master of the ship with whom he contracted, was dead, and the part owners were foreigners."

But the court said there, as I do here, "because it does not appear that the ship was on her voyage, when she wanted the anchor and contracted for it, it is a contract made with the master on land; and is the common case."

It

1786. It appears that the sloop *Two Friends* was not on a
Shrewsbury a voyage; that she was lying here in port under the care
^{v.}
Sloop Two and direction of her owner; that that owner was on the
Friends. spot, and settled in business here.

The contract therefore was made on the land *infra corpus comitatus*, and is not within the jurisdiction of this court. And the hardship in the present case is much less than in the other; for the owner is not only willing but able to give security; and has indeed restored the vessel to the possession of the shipwright.

The chief and only hardship is his being saddled with costs; which it is said, he has been led to incur, from the former practice, and past decrees of this court in similar cases.

I should be sorry, if there were any just ground of complaint against courts of justice. But I apprehend the cause of this complaint is not to be imputed to the court.

A different decree may have been pronounced here; but then I suppose it must have been, when the objection has not been taken; and the court can have no other than the judicial knowledge of any case before them. In the only case where this exception has been taken since I sat on this bench, I gave the same decision as I shall now.

On the whole, after maturely considering and weighing all the circumstances of the fact, and the authorities of law in this case, I do adjudge, pronounce and decree,

That the warrant issued by this court, against the sloop *Two Friends*, be quashed; that the vessel be discharged from the custody of the marshal, and that the actor do pay the costs of suit.

MASSACHUSETTS DISTRICT.

SPECIAL DISTRICT COURT.

Peter H. Natterstrom, Adm. of John Taylor, deceased, v. Ship Hazard, William Smith, late master.

James and Thomas H. Perkins, owners of said Ship,
Respondents.

1809.
May 31.

JOHN TAYLOR, on the 18th *July*, 1805, entered on board the ship *Hazard*, at *Boston*, as a mariner, for a voyage to the northwest coast of *America*, from thence to *Canton*, in *China*, and back to *Boston*, at the monthly wages of sixteen dollars, and signed articles in common form. The ship, soon afterwards, sailed on the proposed voyage, and on the 17th day of *October* 1805, *Taylor*, with three other seamen, while manoeuvring the ship, in a gale of wind, were carried overboard by a sea, and drowned. The ship performed the contemplated voyage in safety, and returned to *Boston* on the 23d *June* 1808.

The law maritime will not sustain a suit for wages, by the legal representatives of a seaman beyond the time of his death, when the engagement was by the month.

It appears that *Taylor* received thirty-two dollars advance wages, before the ship sailed from *Boston*, and that disbursements were made to him, on the voyage, by the master, to the amount of thirty-five dollars and fifty cents, exceeding, in the whole, the amount of wages, to the time of his death. The respondents allege,

S K

and

1809. and it is not denied by the libellant, that by reason of the death of said *Taylor*, and of the three other seamen, who perished with him, the master of the ship was obliged to proceed to *Rio-Janeiro*, where he arrived on the 11th November 1805, there to hire four other seamen, which he accomplished at high and extravagant wages, to replace those who were lost, and to enable him to prosecute the voyage aforesaid; and they further allege, "that it is and ever has been the usage, custom, and practice of the trade, in which said ship was employed, in the voyage aforesaid, for the owner or master of the ship or vessel to pay, and the legal representatives of any mariner belonging to a ship or vessel, who had signed articles of agreement or a shipping paper, and happened to die on the voyage, to receive the wages accruing to such mariner, from the time of his entering on board such ship until his death, at the rate expressed in such articles or shipping paper, in full satisfaction of all claims and demands of such representative against the owner or master of said ship or vessel, for the wages or services of such deceased mariner."

This cause has been amply discussed, and it remains to determine the only question on which it depends; what is the legal effect and operation of the death of the mariner, *Taylor*, in manner and at the time above stated, on his wages? For the libellant it is contended, that the same amount is by law due, as if he had survived and continued in the service of the ship, during the whole voyage. On the other hand, it is contended for the respondents, that his wages, at the stipulated rate, are only to be reckoned to the time of his decease; and, of course, that the libel ought to be dismissed, as more than the amount of wages, due on that principle of computation, had been paid to the deceased.

The counsel for the libellant rests his claim on the 7th article of the laws of *Oleron*, the 19th of *Wisbuy*, and the 45th of the *Hanse Towns*; and on a late decision in the

the circuit court of *Pennsylvania*, *Jackson's administratrix v. Sims*, affirming a decree of the district judge, by which full wages, for the whole voyage, were given to the legal representative of a seaman who had engaged for a voyage from *Philadelphia* to *Batavia*, and back, and who died, in the course of the voyage, at *Batavia*.
[1 *Peters' Adm. Decisions*, 157.]

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In the examination of this subject, I shall first inquire into the genuine meaning and import of the ancient ordinances above mentioned, in reference to the point under consideration. We have, I presume, a correct text of the laws of *Oleron*, in the *Us et Coutumes de la Mer*, by *Cleirac*. The 7th article prescribes the duties of the master, when a mariner falls sick, in the service of the ship. It directs, that he shall be put on shore, and that suitable humane provision shall be made for him. The closing paragraph, which, alone, has special application to the question now under consideration, runs thus; "Et si la nef estoit preste à s'en partir, elle ne doit point demeurer pour luy; et s'il guarit, il doit avoir son loyer tout comptant, en rabatant les frais, si le maistre luy en a fait; Et s'il meurt, sa femme et ses prochains le doivent avoir pour luy." "And if the vessel be ready for her departure, she ought not to stay for the said sick party; but if he recover, he ought to have *his full wages*, deducting only such charges as the master has been at for him. And if he dies, his wife or next of kin shall have it."

I resort to the same author for the correspondent articles in the other ordinances, not having been able to find any copy of the original text.

Ordinances of Wisbuy, Art. 19.

Si le matelot tombe en infirmité de maladie, et qu'il convient le porter à terre, il y sera nourri comme il estoit dans le bord, garde et servy par un valet, et s'il vient en convalescence, sera payé de ses gages; et s'il decede, ses gages et loyers seront payez à sa veuse, ou à ses heretiers.

If a seaman falls ill of any disease, and 'tis convenient to put him ashore, he shall be fed as he was aboard, and have somebody to look after him there; and when he is recovered, be paid his wages; and if he dies, his wages shall be paid to his widow or heirs.

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Laws of the Hanse Towns, Art. 45.

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Que s'il revient en convalescence,
il sera payé de ses gages tout ainsi
comme s'il avoit servy, et s'il meurt,
ses heretiers les retireront entiere-
ment.

If he recovers his health, he shall
be paid his wages, as much as if he
had served out THE WHOLE VOY-
AGE; and in case he dies, his heire
shall have what was due to him.

I adopt the translation given in the "Sea Laws," first published in *England*, in the reign of *Queen Anne*, not from a respect to the translation of those ordinances, in general, as contained in that work, for in several instances it is palpably incorrect, but because, from its long standing in our language, it is entitled to consideration, and in the articles now cited, it gives, to my apprehension, the sense of the text, with sufficient correctness. Stress has been laid, by the respondents' counsel, on a supposed mistranslation of the article from the laws of *Oleron*. It is said that the word *comptant* means *money down*, and, that the addition of the word *tout*, to the word *comptant*, only renders the expression more emphatic. However this may be in modern French, and there are certainly respectable authorities in support of the criticism, I am convinced, that something more was intended by the phrase, as used in the article cited, and that it was designed to express not merely the mode of payment, but has reference to the *quantum*.

It is evident from *Cleirac's* comment, that he so understood it; and I consider the meaning to be the same, as is conveyed by the word *entierement*, which he uses in translating the cited article of the laws of the *Hanse Towns*. *Valin*, in his discussions relative to wages, frequently uses the phrases *en entier* and *en plein*, which are of equivalent import. But these modes of expression do not, necessarily and universally, imply an absolute payment of the wages for the *whole voyage*. Such, indeed, is their frequent application; but we also find expressions of this description employed, when a payment of wages, for a less time than the *whole voyage*, is most evidently intended.

The

The third article of the laws of *Wisbuy* directs, that 1809.
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if a master discharge a seaman without just cause, after the commencement of the voyage, he shall pay him “entierement, tous les gages promis.” This passage, in the Sea Laws, is rendered “all his wages as much as if he had performed the voyage.” This is a free translation, but it gives the sense of the original; and the regulation corresponds with the principle of the 13th article of the laws of *Oleron*, by which an offending seaman, if tendering amends, is to be retained, and if discharged after such offer, is entitled to *full wages*, as if he had continued in the ship. The expression there is “aussi bon loyer comme s'il estoit venu audedans”—“as good hire as if he had come in the ship,” equivalent to *entierement, tous les gages promis*, in the third article of the laws of *Wisbuy*, and to *tous leurs loyers*, in the 20th article of the laws of *Oleron*, applied to a contract by the *run*, when the voyage is abridged by the act of the owner or the master, in proceeding, with the ship, to some port nearer to the place of departure and destined return, than was stipulated in the contract. Other instances might be cited, where this meaning must be understood, but there are also many, in which expressions of this description must have a more restrained construction. *Valin*, in commenting on a royal ordinance of *France*, framed to determine a question relative to ships ordered to a certain station, and there to wait for convoy, recites it in the following terms; “la solde des gens des équipages seroit payée *en plein du jour* que les navires auroient mis à la voile, jusqu’au jour qu’ils auroient mouillé dans la rade du convoi; que depuis qu’ils auroient mouillé jusqu’au jour de la flotte, ils n’auroient que la demi-solde, et qu’apres le départ, la solde leur seroit continué *en entier*, pour le reste du voyage”—“The wages of the crew shall be paid *in full* from the day of the vessels’ sailing to the day of their mooring in the road of the convoy; from the time of their joining the

1809. the convoy to the departure of the fleet, they shall have
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 continue *in full* for the remainder of the voyage." It is
 here apparent that the phrases *en plein* and *en entier*,
 apply to the *rate of wages*, and that for the portions of
 the voyage specified, they shall be without deduction.
 A similar use of this expression we find, relative to
 another ordinance, that of 17th *October* 1748, respect-
 ing vessels waiting for convoy in the colonies. Speak-
 ing of the crew, he says, "seront payés de leur salaries
en entier, pendant le séjour que lesdits navires auront
 fait dans les desdites îles, jusqu'à concurrence du terme
 de six mois, et seulement de la moitié pour le temps
 excédent ludit terme"—"They shall be paid their hire
in full while said vessels shall remain at the aforesaid
 islands, for the term of six months, and half wages,
 only, for the time exceeding said term." Vol. II. 698.

The 11th article of the ordinance of *Louis XIV.* re-
 lative to seamen's wages runs thus; "Le matelot qui
 sera blessé au service du navire, ou qui tombera ma-
 lade pendant le voyage, sera payé de ses loyers et pansé
 aux dépens du navire"—"A seaman who shall be
 wounded in the service of the ship, or who may fall sick
 during the voyage, shall be paid his wages, and be cured
 at the expense of the ship." As it relates to the wages
 of the sick seaman, this corresponds with the 7th article
 of the laws of *Oleron*. The words *tout comptant*, or
 terms equivalent, are not, indeed, inserted; but both
Valin and *Pothier* understand the meaning to be the
 same as if it included such expressions. The latter
 writer, in commenting on this article, observes, "Le
 matelot tombé malade ou blessé au service du navire,
 gagne *en entier* son loyer, non seulement lorsqu'il est
 resté dans le navire, mais même, dans le cas auquel
 ayant été mis à terre, dans un port, ou le navire a re-
 lâché, il y auroit été laissé, s'étant trouvé hors d'état
 d'être rembarqué, lorsque le navire est reparti"—"The
 seaman

seaman who may become sick or wounded, in the service of the ship, is entitled to his wages *in full* not only while remaining on board the ship, but also if he should be put on shore in a port where the ship may have stopped, and should be there left, on account of his being unable to return on board the ship, at the time of her departure." [Louage des Matelots, sect. 2.] It is here apparent that the phrase *en entier*, which must be admitted to be equally forcible with the words *tout comptant*, is applied, by this very accurate writer, to express nothing more, than that there shall be no deduction for sickness, or for absence from the ship, from that cause.

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It may be said, that the commentator, in giving this construction to the article, had in view a subsequent article, of the same ordinance, article 13th, which directs, that the heirs of a seaman engaged by the month, and who may die during the voyage, shall be paid his wages to the day of his decease. But the 11th article in general, and its provisions in favour of a sick seaman, apply not merely to those engaged by the month, but to those engaged on other terms. Further, it is evident, from *Pothier's* comment on the 13th article, that his conceptions of the dispositions made by the 11th article, were formed on distinct grounds, and instead of having a prospective view to the 13th article, while discussing the 11th, he finds the application of the 13th article, relative to heirs, on the provisions made by the 11th article, relative to the sick seaman while alive. The heirs, he says, shall, of course, have the wages accruing during sickness, and the disposition of this article is but an exact consequence of article 11th. "La disposition de cet article n'est qu'une consequence exacte de l'article 11me." [Louage des Matelots, sect. 2.]

In this there is, to my apprehension, a perfect correspondence between *Pothier* and *Valin*. The latter writer, commenting on the 13th article, which relates wholly to what the *heirs* shall recover, commences his remarks

1809. remarks by stating, what the deceased seaman had acquired. "Le matelot ayant gagné ses loyers jusqu'à son décès arrivé pendant le voyage, et cela, aussi bien durant le temps de la maladie que pendant celui qu'il a rendu un service effectif au navire, il est bien juste qu'ils passent à sa veuve et heretiers." "The seaman having earned his wages to the time of his death, happening, during the voyage, as well during his sickness, as for the time when he rendered actual service on board the ship, it is just that they should go to his widow and heirs."

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In this passage, *Valin* evidently has reference to the 11th article. In his comment, on that article, he denominates the disposition which it makes relative to wages of a sick seaman, as a right to wages *en plein*; an expression which must be understood, as it is used by *Pothier*, in this connexion, to intend, merely, that there shall be no diminution of wages on account of sickness.

It is to be understood, that I do not consider the dispositions made by the articles of this ordinance, as an authoritative settlement of the question; though they are most explicit in their terms. I only resort to them and to the commentators above mentioned, with a view to a right understanding of the phraseology employed in the articles of the laws of *Oleron*, *Wisbuy*, and the *Hanse Towns*, all of which are given in the French language by *Cleirac*, and from whose work the received English translation appears to have been made. From this examination, I am satisfied, that the terms *tout comptant*, *en entier*, or *entierement*, as applied to wages, do not, necessarily, mean wages for the whole voyage; that they admit of a different and more limited application, according to circumstances, and that the true meaning, in the respective instances, in which they are employed, must be determined from the subject matter and the connexion. *Noscitur ex sociis.*

I may further add, that it is not unfrequent, where the

the meaning might be otherwise equivocal, to add expressions, which render the sense perfectly certain, such as "comme s'il avoit servi tout le voyage," or the like.

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Applying these views of the language of the law, which we are considering, to the 7th article of the laws of *Oleron*, and to the correspondent articles in the laws of *Wisbuy* and of the *Hans Towns*, I cannot find, that those articles either express or intend, that the heirs of a seaman dying in the course of the voyage, shall recover wages in his right, as if he had lived and served out the voyage. The object of all those articles is to make suitable dispositions relative to seamen falling sick on a voyage. They direct how they shall be treated, and what shall be the results as respects their wages, in case of recovery, or of death. The expression, *tout competent*, in my apprehension, means nothing more, than that there shall be no deduction on account of sickness, either as against the seaman himself, if he recover and claim his wages, or against his heirs in case of his decease. Two interesting points were established by these articles, both wisely and humanely calculated to sooth the sorrows of the sick, or disabled mariner; that his calamity, if not produced by his own criminality or fault, should not diminish his stipulated wages, during the existence of his disability, or his necessary absence from the service of the ship from that cause; and, that in case of his death, all that was due to him should descend to his heirs. Both these provisions seem so perfectly reasonable, that, it may at first view appear, that a formal article could hardly be necessary to enforce them, and we may, on this ground, be induced to apprehend that something more was intended. But the first point is, even now, occasionally questioned by ship owners and masters, and, we may easily satisfy ourselves, that, it then appeared necessary that both should be declared. The application of the Roman law *de locatione et conductione*, to which *Pothier* expressly refers,

1809. fers, for a construction of the contract of hiring of labour, Peter H. Nat- in general, and for the hire of seamen, in particular, terstrom would exclude a claim for compensation during the Ship Hazard. disability of the servant or labourer. But, as generous masters, says this esteemed commentator, will not insist on a strict enforcement of their rights, but continue the compensation of a sick servant, notwithstanding his disability to perform his stipulated services, so the law marine in relation to mariners converts into an obligation what, in other instances of hire, is the result of benevolence. The object of the law, he adds, is, for the encouragement of seamen, and as a compensation for the risk which they run of an entire loss of wages, from inevitable accidents occurring to the ship, or from a destruction of the voyage. *Louage des matelots.*

Doubts derived from the rules of law relative to entirety of contracts, and perhaps also some principles of the law *de societate*, might have rendered necessary the express declaration, in favour of heirs, that is made by the articles under consideration. A similar provision was made by the *Consolato del Mare*, and we learn from *Cleirac*, that it was the express object of an ancient ordinance of *France*, to declare such right of succession in favour of the heirs of mariners, dying on the voyage. "Si le marinier meurt à voyage, les ordonnances de *France* conservent ses biens à ses heretiers en termes généraux, sans parler précisément, comme fait ce jugement, des loyers ou gages meritez ou à mériter." "If a mariner die on the voyage, the ordinances of *France* preserve his property to his heirs, in general terms, without specifying, as this article does, wages earned or to be earned." *Cleir. 34. on art. 7. of laws of Oleron.*

It is not necessary, therefore, in order to satisfy the expressions in the laws of *Oleron*, and in the other ancient marine codes, to consider them, as giving to heirs of a mariner, dying on the voyage, the same amount of wages,

wages, as the deceased would have received, if he had lived until the termination of the voyage. I admit, in- 1809.
deed, that the phrase *tout comptant*, in the laws of *Oleron*, is to be understood to apply to the heirs as well as to the seaman, as the word *entierement* is, in the laws of the *Hanse Towns*, and, that these terms are well enough rendered by the expression *full wages*. Still it remains to be determined, what is the precise import of these expressions, used in this connexion.

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The apparent or plausible ground, on which a diminution of wages may be claimed, by a master, against a seaman, being, in any case, suggested, will enable us to determine in what sense, the words *en entier* or *entierement* are to be understood. When a seaman is discharged without good cause, no question could occur to any reasonable mind, relative to his earnings to the time of his discharge. Whatever doubt might arise, in regard to his claim for wages, would respect the remainder of the voyage, from which he was wrongfully expelled. In such a case, therefore, we must understand the term *entierement*, in the third article of the laws of *Wisbuy*, to intend wages for the whole voyage. But in the cases supposed by the 7th article of the laws of *Oleron*, the only ground, which could be suggested for a subtraction of wages, is the sickness and disability of the mariner; and when it is said, he shall, notwithstanding, receive his wages *tout comptant*, it is apparent, that nothing more is intended, than that no deduction shall be made on that account. An application of this construction to the different cases that might occur will test its solidity.

1st. With regard to the seaman himself. If he recover, says the law, he is to have his wages *tout comptant*. If, after such recovery, he rejoin the ship, before the completion of the voyage, his right to wages *tout comptant*, or to full wages, must, in such a case, evidently mean, that no diminution shall be required on account of

1809. of his nonperformance of duty or absence from the ship by reason of sickness. His claim to wages, for the residue of the voyage, will depend on future services and circumstances, and not on the provisions made by the law relative to the operation of his sickness. A like construction of the article must, I apprehend, be given, if a seaman, who may be left abroad sick, should recover and return home before the arrival of the ship, and the ship should afterward arrive in safety. If the sickness be supposed to be of such continuance, that he be not able to return to the ship during the voyage, but he survives the prosperous termination of the voyage and returns home after the arrival of the vessel; he shall in like manner, by the articles cited, have wages *tout comptant* or *entierement*, or *full wages*. The wages in this case, would, indeed, be for the *whole voyage*; but the force and meaning of those operative expressions are the same as before. He shall receive wages for the whole voyage, not because *tout comptant*, *entierement*, or *full wages*, necessarily and exclusively mean wages for the whole voyage; but because, as in the other case, they protect him from a deduction from his wages on account of sickness, and the sickness or disability, which entitled him to indulgence, is supposed to have continued until the termination of the voyage.

2d. In regard to the *heirs* of such *deceased seaman*. I understand the same expressions, by fair implication, to extend to them, but in the *same sense*. If the sick seaman survive the prosperous termination of the voyage, and afterward die, without having recovered his wages, his heirs shall recover them *entierement*, or *tout comptant*. But, in this case, the same remarks are applicable, which have been suggested relative to a demand for wages by the seaman himself, after such conclusion of the voyage; and, for the same reason, the meaning of the terms *entierement* or *tout comptant*, remains, in this case, equally unchanged. The right to wages,

wages, in such a case, for the whole voyage, results not from the mere force of those terms, but from this con-current, essential fact, the continuance of the disability or absence from that cause, commensurate with the voyage.

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The death of the seaman, before the termination of the voyage, presents a case involving the very point in question. In such case, also, the heirs shall receive the wages *entierement* or *tout comptant*. But we ought to understand those terms, in the same sense as they are evidently to be understood, in the preceding cases. If we construe them as giving to the heirs the wages, for the residue of the voyage, we, in fact, change their meaning, or include an idea not implied in those terms, in the other cases supposed. This would appear to me an inadmissible mode of construction, as the subject matter, to which the terms are applicable, is unchanged. In the case of a seaman wrongfully dismissed from a ship, his connexion with the ship is dissolved by the mere injurious act of the master. This act gives to the seaman an immediate right to wages for the whole voyage, subject, indeed, to contingencies which may defeat the voyage, and of course his claim. But the object of the provisions relative to disability was not to give a new right to the seaman, in consequence of his falling sick, but to protect him from loss. I am satisfied, therefore, that the expressions referred to, must, in case of death during the voyage, be understood in the same sense as in the other cases, and that they mean nothing more than a security against any diminution of the wages, on account of sickness.

In this manner, it appears to me, these articles were understood by the commentators; and I find no intimation, either in *Cleirac* or *Valin*, that they considered the heirs entitled to wages by these articles, beyond the death of the seaman, whom they might represent. *Cleirac*, under the 7th article of the laws of *Oleron*, men-tions

1809. tions the ordinances of *Charles V.* giving to the widow or heirs of a seaman, dying on the outward voyage, one half the wages agreed for, and, if dying on the homeward voyage, the whole wages. He remarks the correspondence of this provision with the dispositions made by the *Consolato del Mare*, which also provides, that the heirs of a seaman, who was engaged by the month, shall be paid according to the time that he may have served. He then proceeds to notice a more favourable provision for widows and heirs of deceased seamen in ships of war, on long voyages; that, if a man should die, on the first day after the commencement of the voyage, his heirs should be paid for the whole voyage. "Ses heretiers seront payés pour tout le long du voyage." If *Cleirac* intended to compare this generous provision with the disposition made by the laws of *Oleron*, he could not denominate it, *more favourable*, on the construction contended for by the libellant's counsel in this case; for, on such construction, the provision by the 7th article of those laws, would be, in fact, the same as is noted by *Cleirac*, to have been observed on board ships of war. But if he is to be understood as making a comparison with the regulations of *Charles V.* and of the *Consolato del Mare*, previously mentioned in his note, it would still appear unaccountable, why this instance of such generous provision should be alone selected, and that he should be silent as to a like disposition, made by the very article on which he was commenting, according to the construction contended for by the counsel for the libellant. The strongest aspect in *Cleirac*, in another direction, is in the expression, "loyers ou gages *meritez ou à meriter*," in the note above quoted. But I understand the word *meritez* to refer to the wages earned while the mariner was performing service, and *à meriter*, not to have reference to any supposed accruing of wages after death, but to those earned or considered as earned during sickness

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sickness and disability, or absence from the ship from such causes.

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Valin, it is well known, is copious and minute; and abounds in references to the laws of *Oleron*, *Wisbuy*, and the *Hanse Towns*, and to *Cleirac's* commentary. I cannot find, in his ample and very valuable work, any recognition of the doctrine, that by the laws of *Oleron*, *Wisbuy*, or the *Hanse Towns*, the heirs of seamen dying on the voyage, should recover wages, as if such seaman had served out the voyage.

The 15th article of the ordinance of *Louis XIV.* provides, that the wages of a seaman, killed in defending a ship shall be paid in full as if he had served the whole voyage, provided the ship arrive in safety. We should expect the commentator, under this article, to remark its correspondence with the laws of *Oleron*, *Wisbuy*, and the *Hanse Towns*, relative to seamen dying from any other cause, if, in his opinion, those laws were to be thus understood. On such extended construction, also, of the 7th article of the laws of *Oleron*, we should expect the commentator to notice its repugnancy to the 11th article of the ordinance of *Louis XIV.* We find no such intimation; but from a careful inspection of his comments, particularly on articles 11th, 13th, and 14th, I am satisfied, that this able writer did not understand the laws of *Oleron*, *Wisbuy*, and the *Hanse Towns*, as giving a claim to wages beyond the death of the mariner. It should be observed also, that if the 7th article of the laws of *Oleron*, did, in true or received construction, give full wages for the whole voyage, *in all cases of death, on the voyage*, without fault on the part of the mariner, there could be no necessity, as those laws constituted a portion of the marine law of *France*, to make the special and exclusive provision of that nature, for a seaman killed in defending the ship, as is done by the 15th article of the ordinance of *Louis XIV.*

It

1809. It is material in the next place to inquire, how these ancient marine codes have been generally understood in the countries originating them. I can find no evidence, that they have, in any European country, been applied in the sense contended for, in this case, in support of the libellant's claim. It is well observed by *Valin*, that next to equity in a law, are its perspicuity and brevity. The 7th article of the laws of *Oleron* and the correspondent articles in the other ordinances, are sufficiently brief. They are not remarkable for perspicuity, and, on the construction contended for, in support of the present claim, would not be equitable. There would result one fixed, invariable rule, in case of the death of a seaman, during the voyage, whatever might be the nature of the engagement, whether by the month, for the voyage, part-profit, or freight. If there had been no other resource, some tolerable system might, by a course of decisions, have been founded on the basis of this article, relative to the cases of death of mariners during the voyage; but it does not appear that the law upon this subject has been extracted from this source, excepting so far as relates to the operation on wages of sickness, and disability of a seaman. The fact is, that exact and definite provisions, reasonably accommodated to the necessary diversity of occurrences, had before been established by an excellent and venerable code, originating among a very intelligent and highly commercial people. I refer to the *Consolato del Mare*; the 127th article of which expressly provides, that the heirs of a seaman, engaged by the month, and dying on the voyage, shall be paid his wages for the time of his service. *Se il marinaro è accordato a mesi, et morirà, sia pagato, et dato alli suoi heredi per quello, che havessi servito.* The preceding article directs, that if the engagement be by the voyage, half or the whole shall be received

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received by the heirs according to the period of the voyage in which the death should occur.*

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These articles of the *Consolato* are quoted by *Cleirac*; and from the manner in which *Valin* refers to them, and to *Cleirac's* quotation, I understand him to mean, that they constituted a portion of the received marine law of *France*, on this subject.

I have no means of information, of the application of the laws of *Wisbuy*, in this particular, in the countries, where they may be supposed to have had special influence or authority. In determining on the application of the laws of the *Hanse Towns*, it would have been satisfactory, to have consulted *Kuricke's* commentary on the revised code of those laws, of 1614. This work I have not been able to find; but in "the *Ship and Sea Laws of Hamburg*" as contained in *Herman Langenbeck's* treatise, published A. D. 1727, there appears to be an affirmation of the law of *Oleron*, as to the manner in which a seaman, falling sick on the voyage, shall be treated; and, if he dies on the outward passage, the heirs are to have half his wages and privilege, if on the return voyage, the whole; deducting the expenses of interment. In this principal city, therefore, of the *Hanseatick* confederacy, we find an express partial adoption of the provisions, made by the *Consolato*, on this subject, with this only difference,

* There is a diversity, in the different editions of this work, in the numbers of the chapters. The edition here quoted is that of *Leyden*; printed in 1704. In *Cleirac's* commentary, the chapter here referred to as the 127th, is quoted as the 130th. *Valin* cites it by double numbers. The *Consolato del Mare* contains precise regulations on several topics, not contained, or only incidentally mentioned, in the laws of *Oleron*, of *Wisbuy*, or of the *Hanse Towns*. It is to be regretted that a work, so comprehensive and valuable, should be so rare, and it appears surprising that an English translation of this venerable code has never yet appeared. A French translation, with commentaries and dissertations of much promise, has recently been announced. [Anthology, for February last.] It may be hoped, that this example will be duly emulated, and that a long time will not elapse, before our *Bibliotheca Legum*, shall present this valuable work, in our own language.

1809. that the *Hamburg* law makes the same provision, whether the contract be for the month or for the voyage, which the *Consolato* distinguishes. It is observable, that we do not find, in *Langenbeck's* commentary, any intimation, that, by the laws of the *Hanse Towns*, the heirs of a seaman, dying on the voyage, would be entitled to the whole sum, which such seaman would have earned, if he had lived to the end of the voyage. Such a disposition would have been materially different from that made by the 30th article of the *Hamburg* laws, on which he was commenting, and if such diversity, in true construction, really existed, we must suppose it would have been noticed. The *Hamburg* regulations disregard the distinction that is made by the *Consolato del Mare*, between an engagement by the month, or for the voyage, as respects the amount of wages to be paid, in case of death of a seaman during a voyage. The discrimination, made by the *Consolato*, is adopted by the ordinance of *Louis XIV.* and it is believed, was the previous maritime law of that country, by tacit adoption of that provision in the *Consolato*. *Pothier* suggests a reason for the distinction. The seaman, who is engaged by the month, does not sustain the risk of calms, contrary winds and other impediments, which may prolong the voyage; however protracted, if not interrupted, or broken, so as to defeat a claim for wages, they are commensurate with the length of the voyage. Whereas one engaged for the voyage, runs the risk of an inadequate compensation for his services, by an accidental protraction of the voyage, beyond the term contemplated as the measure of his reward, when the contract was made. On this ground, says *Pothier*, the ordinance proceeds, corresponding in this particular, with the *Consolato del Mare*, and, as a compensation for the different risks, is the distinction made. [*Louage des Matelots.*]

I proceed to inquire, how the law, on this subject, has

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has been considered and received in *England*; a question, for obvious reasons, of material importance. The rules and proceedings in maritime matters, in that country, became ours, by express adoption, in the first *New-England* colony; (*Plymouth Colony Laws*, 48.) and the law on this subject, as understood and practised in that country, before our revolution, may be considered as making a portion of our law, unless some other express provision, adverse decisions, or contrary received usages, either before or since the revolution, should have effected an alteration.

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The foreign ordinances, on maritime affairs, have not the binding force or authority of law in *England*; not even the law of *Oleron*, to which that nation have long been, and still are, particularly partial. The extent of the adoption of any article of those laws, in that country, and the sense in which they are received, can only be learned from the decisions of their courts, and the approved treatises of their eminent juridical writers.

To *Godolphin's "View of the Admiral Jurisdiction"* there is annexed an appendix containing a translation of the laws of *Oleron*, with notes and observations. That part of the seventh article, which is relied on in this case, is thus rendered: "He ought to have his full wages or competent hire, rebating or deducting only such charges as the master hath been at for him, and, if he dies, his wife or next of kin to have it." To this is added the following note; "Executors of a deceased mariner ought to receive the wages due to him."

I would here make the same remark as I have before suggested relative to the translation given in the "Sea Laws."

I do not introduce the translation, inserted in that appendix, from a respect to its general correctness, for

1809. for there are some palpable and some whimsical errors.* But the translation, given in the treatise, of the 7th article of the laws of *Oleron*, with the note subjoined appears to me to evince, that this learned civilian did not receive the article in a sense, which would support the present claim. *Molloy*, in referring to the articles of the laws of *Oleron*, copies the provisions relative to the seaman's right to wages, if he recover from his sickness, but altogether omits the provision respecting the heirs. He inserts the substance of that article of the Rhodian law, which subjects the master to the payment of a year's hire, to the heirs of a mariner, drowned in consequence of insufficient tackling. In both these instances, if it were part of the marine law, as received in that country, that in case of a seaman dying on the voyage, his heirs were entitled to recover wages as if he had lived and performed the voyage, it was certainly a strange and culpable omission not to insert or to intimate it, in an elaborate treatise "de Jure Maritimo." But my opinion, on this part of the subject, does not altogether rest on omissions of this sort. Later and more accurate English writers than *Molloy*, are very clear and express on this point. *Abbot* considers the construction of the foreign ordinances as doubtful. In the English law books,

* A remark of this sort may seem to require verification. Two instances, only, will be mentioned in this place. Art. 14th "*Oster la touaille trois fois*," is understood, in this translation, to mean *three times*, *lifting up the towel*, and it is thus copied into *Molloy*. The true meaning, a *denial of the mées three times*, is given in the *Sea Laws* and in other subsequent compilations.

Art. 9th. *Les mariniers doivent avoir un tonneau franc, et l'autre doit PARTIR AU JECT*, is thus translated: "The mariners also, ought to have one tun free and another divided by *cast of the dice*." This rendering is followed in the *Sea Laws*, in *Postlethwayt's* Dictionary of Trade and Commerce, and in some later publications. It is evident from *Cleirac's* commentary, that the contribution to a jettison, intended here to be directed, is not to be decided by *cast of the dice*. The seamen are to have one ton free, and the remainder of their privilege is to contribute its proportion. The article, says the commentator, "ordonne pour les mariniers un tonneau franc en la contribution, et veut que la reste participe au jet."

he says, there is no general decision on the subject; 1809.
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laws of *Oleron* and the other foreign ordinances. But we have no opinion from the admiralty, nor in the common law authorities, that wages are recoverable, after the death of a seaman, for the subsequent portion of the voyage; and it is observable, that such a position is not found to be maintained in argument, though, if correct, it would certainly, forcibly apply in several cases reported in the books. "In the case of a mariner's dying in the course of the voyage" says a learned judge of the court of common pleas, "*it should seem* that he is entitled to a *proportionate part* of his wages, unless he be excluded by the specific terms of his contract." (Justice *Heath*, 3 *Bos. and Pul.* 425. *Beale v. Thomson.*) An observation of this sort, from a learned judge of the court, and the dubious, qualified language of *Abbot* and *Comyns*, that a *pro rata* recovery of wages *seems to be admitted* in case of a death of a seaman on the voyage, who was hired by the month, indicate their views on this subject, and are inconsistent with the supposition that they considered the law as giving wages for the *whole voyage* in such case, or that such is the received law in *England*, on that subject.

In our own country, the law and usage appear to have been the same; in *Massachusetts* I may say, uniformly so.

We find, indeed, no decision. A demand of this description does not appear to have been made in legal shape, until since the late decision in *Pennsylvania*. The libellants' counsel was apprised, that the court would hear evidence, of any usage in support of this claim. None has been offered, and it was frankly admitted, that the contrary usage had prevailed, with the exception above expressed.

The uniform usage, as alleged by the respondents, is satisfactorily maintained. To introduce a different rule, would, in my opinion, be to give a construction of

of the contract, not contemplated by either of the contracting parties, and not consonant to the law, on the subject, at the time when the contract was made. I perceive, in the report of the case determined in *Pennsylvania*, it is intimated, that the extreme severity on shipowners, of the operation of the decisions in the district court, has produced a general practice of inserting a covenant in the shipping articles, that wages shall cease on the death of a seaman. The introduction of such provisions may be attended with difficulties, among a class of men, frequently uninstructed, attached to old forms and habits, and who may be jealous of an express stipulation, though, in reality, altogether consonant to a tacit construction, by which they had ever been governed. It would be injurious to require it, unless absolutely necessary. From my view of the law on this question, it does not appear to be requisite, unless it be to avoid controversy, on a subject, on which there is a diversity of sentiment. I regret this collision with opinions which I highly respect. It was incumbent on me, under such circumstances, to weigh, with great deliberation, the grounds of a different persuasion; but such being my opinion, after thorough examination, I consider it a duty to declare it. I ought here to suggest the relief afforded to my mind, in regard to difficulties of this description, by an interlocutory opinion expressed by the hon. judge *Cushing*, at the last circuit court in this district, in the case of *Oystead*, admr. v. the ship *Perseverance*, and by the consideration, that the decision now given, if erroneous, may be revised and corrected in a higher tribunal.

The examination which I have made of this subject, has led me to an affirmative conclusion on the following points.

1st. That, by general principles of law, on a contract of hire, no compensation can be claimed beyond the death of the party hired.

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1809. 2d. That the laws of *Oleron*, or of the Hanse Towns, do not provide, that, in case of the death of a seaman on a voyage, wages are recoverable beyond the time of his death.

3d. That the intent of those ancient ordinances, in the articles relied on in this case, was to determine the effect and operation of sickness or disability, incurred in the service of the ship, during the voyage, and to provide for payment of wages, without *deduction on that account*, either to the seaman, if he recover his health, or to his heirs, in case of his death.

4th. That it does not appear, that those ordinances have, in those countries where they are peculiarly authoritative, been used and applied as entitling the heirs to wages, for any time subsequent to the death of a seaman.

5th. That approved commentators, such as *Cleirac* and *Valin*, do not establish the construction contended for in support of this claim.

6th. That the *Consolato del Mare*, a work of approved authority, in case of an engagement by the month, and death on the voyage, expressly limits the wages to be recovered by heirs, to the time of the death of the mariner.

7th. That the law marine has not been otherwise understood and received in *England*, but in regard to an engagement by the month, and death on the voyage appears to be consonant to the *Consolato del Mare*.

8th. That in *Massachusetts*, the usage has uniformly been to make payment of wages, in such case, only to the time of the death of the seaman, and the law has been considered as consonant to the practice.

On these considerations, it is my opinion, that the law maritime, which I am to administer, will not sustain a claim for wages, by the legal representatives of a seaman, beyond the time of his death, when the engagement was by the month.

In the present case, advances were made exceeding 1809.
the amount of wages, due at the time of the seaman's ^{Peter H. Nat-}
death. I therefore decree, that the administrator take ^{terstrom}
nothing by his libel. ^{v.}
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It is understood that no costs are claimed.

(Signed)

JOHN DAVIS,
Dist. Judge, Masst. Dist.

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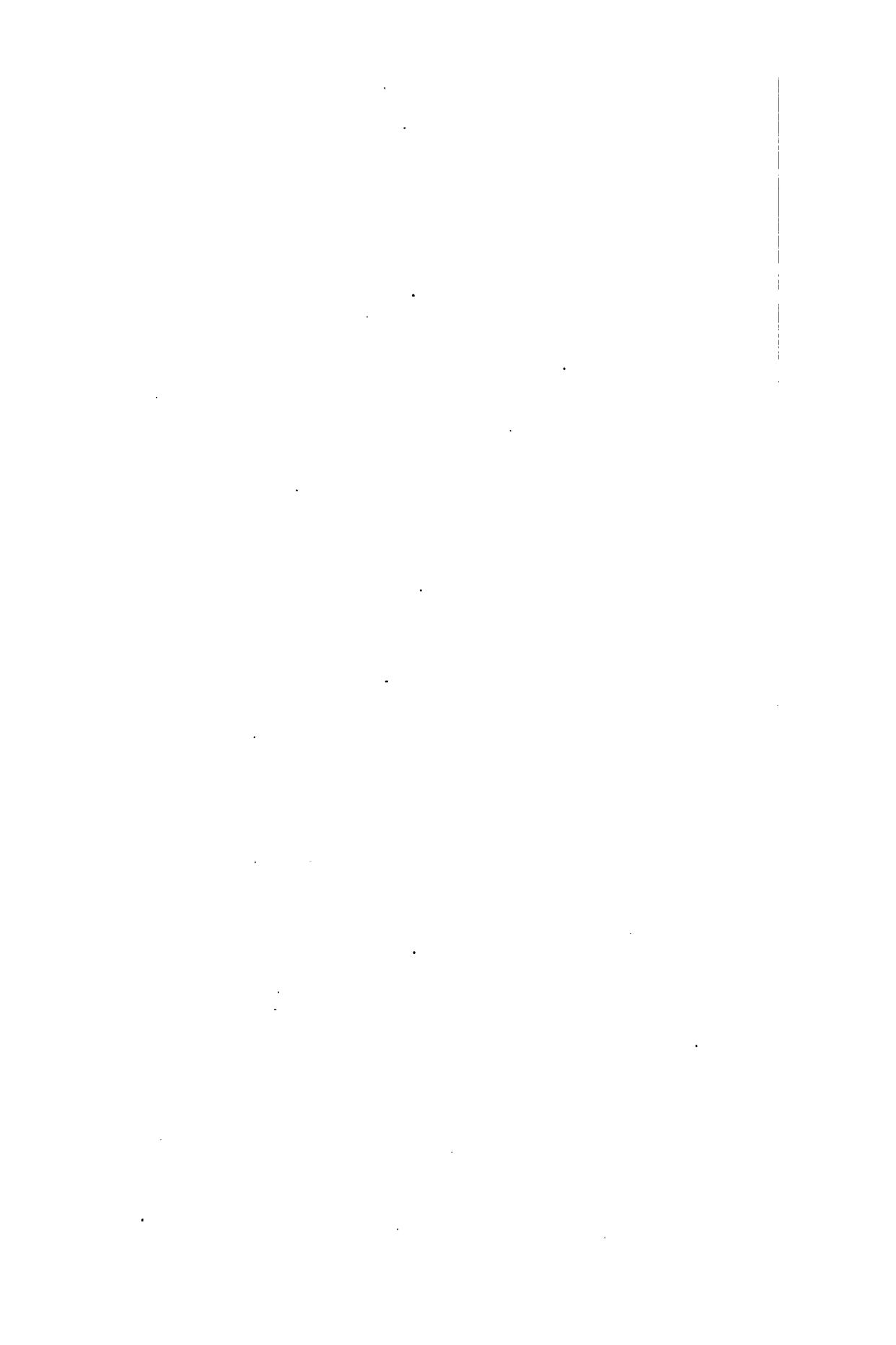
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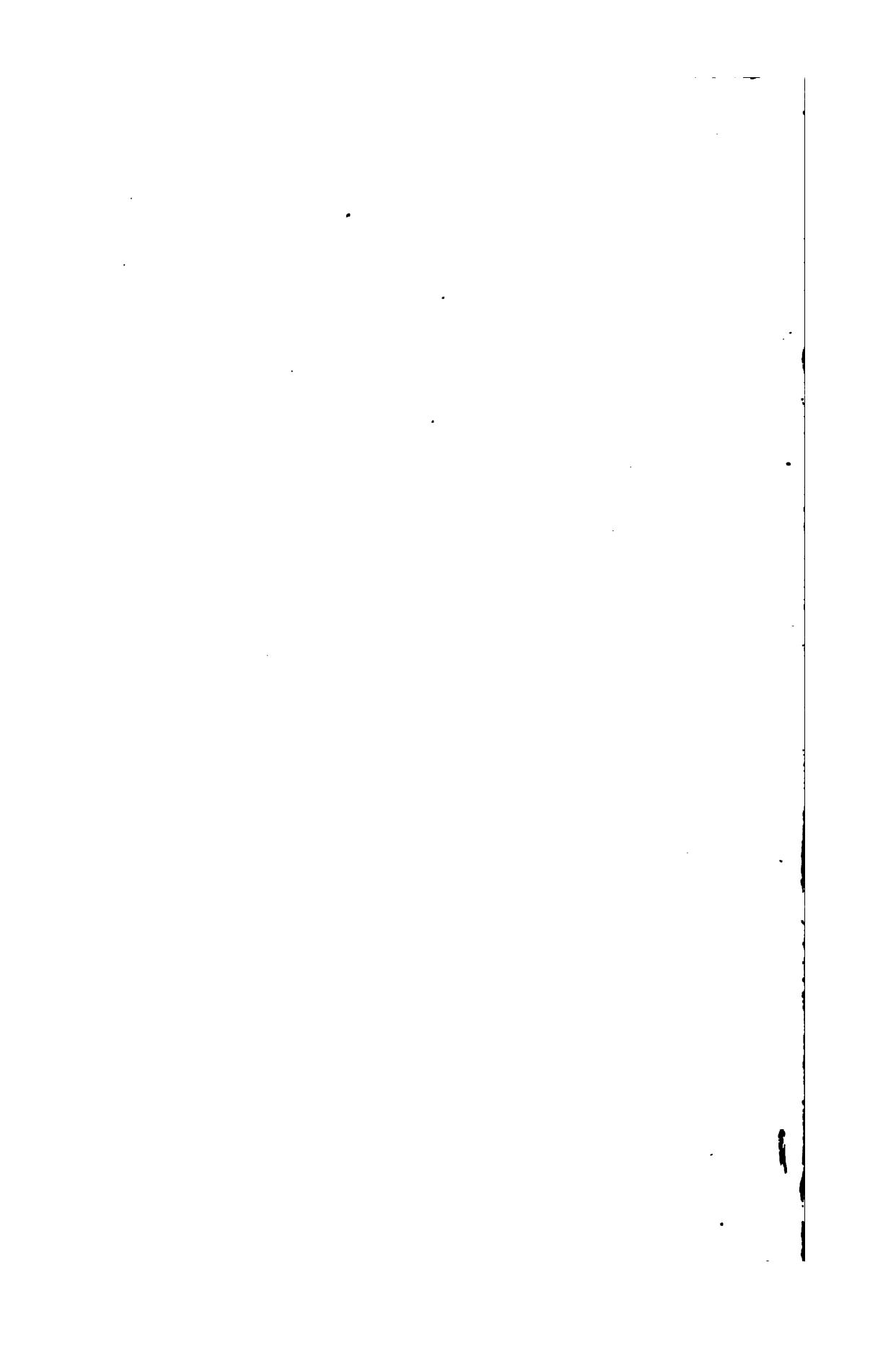
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